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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 578

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1945.

CERTIORARI GRANTED JANUARY 2, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. A] [File endorsement omitted.]

[fol. 1]

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al., Complainants,

vs.

CHESTER BOWLES, Price Administrator, Respondent

COMPLAINT UNDER SECTION 204(e)—Filed June 8, 1945

This complaint is filed under Section 204(e) of the Emergency Price Control Act of 1942 as amended. In conformity with Rule 11 of this Court, complainants specify:

(1) *The names and principal business address of the complainants:* Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff (president of said Company), 860 West Evergreen Avenue, Chicago 22, Illinois.

(2) *The Regulation objected to and the effective date thereof:* Maximum Price Regulation No. 30, and more particularly Section 1347.14(d) thereof, effective November 27, 1942, 7 F. R. 9732.

(3) *The date on which leave was granted to file the complaint and the court granting the leave:* May 10, 1945, United States District Court, Northern District of Illinois, Eastern Division. (True copies of the application for such leave and the order of the court granting it are annexed hereto in the Appendix.)

[fol. 2] (4) *The manner in which complainants are subject to the regulation complained of:* Complainants for many years have purchased, sold and dealt in printers' unsorted wastepaper, the maximum price of which is purported to be established by Subsection (d) of Section 1347.14 of the Regulation. They also deal in various grades and classifications of wastepaper, the maximum prices of which are established by other provisions of the Regulation. During the period July 16 to September 11, 1943, the corporate

complainant; of which the individual complainant is president, sold unsorted wastepaper to consumers thereof.

(5) *The objections with respect to which leave to file the complaint was granted, which are intended to be relied upon in support of the complaint:*

1. Complainants say that Subsection (d) of Section 1347.14 of the Regulation was invalid and of no effect during the period July 16 to September 11, 1943. In its present form [1] Section 1347.14(d) reads:

> "The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for 'No. 1 mixed paper,' regardless of the grades and quantity of each grade contained in such unsorted wastepaper." [2]

Facts in support of the objection:

a. Prior to the Regulation, the price of unsorted wastepaper varied in relation to the materials con-

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[1] As amended December 28, 1943, 8 F. R. 17483.

[2] Complainants' objections to the Regulation apply directly to the version of Subsection (d) prior to its amendment on December 28, 1943. The former text was as follows: "*Maximum prices for unsorted wastepaper.*—Unsorted wastepaper, which contains two or more unsorted grades, shall not be subject to the maximum prices prescribed by this Maximum Price Regulation No. 30, in the event that such paper is sold to a purchaser who warrants in writing to the seller that he will not use such paper as a consumer thereof, but will sort and grade it for resale into (1) grades listed in this Maximum Price Regulation No. 30, or (2) specialty grades described in paragraph (c) of this § 1347.14, or (3) paper which does not constitute wastepaper, as defined in § 1347.11, and that he will sell such paper so sorted and graded at prices no higher than the maximum prices prescribed for such grades by this Maximum Price Regulation No. 30, or by any other applicable maximum price regulation or price schedule. If, however, such unsorted paper is sold to a consumer thereof, the price therefor shall not exceed the maximum price prescribed by this Maximum Price Regulation No. 30 for 'No. 1 mixed paper'."

tained in each lot thereof. Every lot of unsorted wastepaper is always of a different value from any [fol. 3] other lot of unsorted wastepaper. Complainants' business consists in large part in dealing in printers' unsorted wastepaper, which is made up of clippings of new paper from printers' cutting machines, and consists of unbleached and bleached sulphite and soda pulp, which, by reason of its high quality, is manufactured into book and bond paper. This type of unsorted wastepaper has always been distinguished from a lower grade of unsorted wastepaper obtained from office buildings, department stores, etc., which is used to manufacture box board and paper board.

b. Section 1347.14(d) of the Regulation fixes the maximum price for all types of unsorted wastepaper sold to a consumer in terms of a specification or standard, "No. 1 mixed paper". Prior to the Regulation, the specification or standard in question was not in general use in the wastepaper industry and it had not previously been promulgated and its use lawfully required by another Government agency.[3] Consequently,

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[3] In his supplementary statement of considerations to Maximum Price Regulation No. 30, issued September 11, 1943, the Administrator said:

"'In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not heretofore known in the industry. Section 1347.14(d) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for 'No. 1 mixed paper.' This was not the practice in the industry prior to price control. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. Maximum Price Regulation No. 30 penalizes sellers upon their sales of unsorted paper to a consumer. This provision affects a very small percentage of the industry's total volume and is absolutely necessary in order to secure effective price control with respect to wastepaper.'"

[fol. 4] the Price Administrator was prohibited by Subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known as the Taft Amendment, enacted on July 16, 1943,[4] from promulgating Section 1347.14(d) of the Regulation without first determining that no practicable alternative existed for securing effective price control with respect to unsorted waste-paper. The Price Administrator did not make such a determination until September 11, 1943.[5] Therefore, Section 1347.14(d) of the Regulation was by force of the Taft amendment invalid and ineffective between July 16, 1943, the date of enactment of that amend-

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[4] The subsection reads as follows:

"(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

[5] On September 11, 1943, the Administrator issued supplementary Order No. 64 (8 F. R. 12554) by which he amended the preamble to MPR 30 by adding thereto the following sentence: "Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation."

ment, and September 11, 1943, the date of the Administrator's determination.

c. On December 17, 1943 the complainants were indicted in the United States District Court, Northern District of Illinois, Eastern Division, for alleged viola- [fols. 5-6] tions of Maximum Price Regulation No. 30. Said indictment is still pending, the present complaint being filed pursuant to leave granted by said Court upon application of complainants, as more fully appears in the Appendix hereof. On June 29, 1944 the Price Administrator instituted against the complainants, in the same Court, a civil action for treble damages and an injunction, which action is still pending. Both proceedings involve sales of unsorted wastepaper to consumers alleged to have been made between July 16 and September 11, 1943 at more than the maximum price fixed by Maximum Price Regulation No. 30.

(6) *The nature of the relief requested:* Complainants request that this Court enter its judgment determining and declaring Section 1347.14(d) of Maximum Price Regulation No. 30 to have been invalid during the period from July 16 1943 to September 11, 1943.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants. Address for Service: 231 South LaSalle Street, Room 963, Chicago 4, Illinois.

[fol. 7] APPENDIX TO COMPLAINT

True Copies of Application and Order

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 43 CR 735

UNITED STATES OF AMERICA, Plaintiff,

vs.

THOMAS PAPER STOCK COMPANY, a Corporation of the State of Illinois, and ALVIN E. SANDROFF, Defendants

APPLICATION FOR LEAVE TO FILE A COMPLAINT IN THE EMERGENCY COURT OF APPEALS—Filed April 13, 1945

Defendants, Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, by their attorneys, Gottlieb and Schwartz, David L. Bazelon and Jack H. Oppenheim, hereby apply to this court for leave to file in the Emergency Court of Appeals a complaint against Chester Bowles, Price Administrator, setting forth objections to the validity of the provisions of Maximum Price Regulation No. 30 which the defendants are alleged, in the indictment herein, to have [fol. 8] violated. In support of this application defendants represent unto the court the following:

1. This application is filed pursuant to the provisions of Section 204 (e)(1) of the Emergency Price Control Act, as amended by the Stabilization Extension Act of 1944.

2. On June 15, 1944, the defendants filed a protest with the Price Administrator, pursuant to the provisions of Section 203 of the Emergency Control Act, against Maximum Price Regulation No. 30, as applied to the sales of unsorted waste paper alleged in the indictment to have been made between July 16 and September 11, 1943 at more than the maximum price fixed by MPR 30. The protest was directed to Section 1347.14 (d) of the Regulation, upon two grounds. Both were based upon the fact that said section fixes the maximum price for unsorted waste paper in terms of a specification or standard, "No. 1 mixed paper", and that such provision is in violation of Subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known

as the Taft amendment, which was enacted on July 16, 1943.

The first objection which was asserted by the defendants in their protest was that the Price Administrator was prohibited by the Taft amendment from establishing maximum prices by the use of a standard or specification in the absence of one of the two conditions described in clause (4) of Section 2 (j). The second objection asserted by defendants was that even if clause (3) of Section 2 (j) of the Taft amendment be construed as authorizing the Administrator to employ specifications or standards for the purpose of fixing maximum prices of a commodity when he determined that no practical alternative exists for securing effecting price control with respect thereto, the fact is that in the case of unsorted waste paper he did not make such a determination until September 11, 1943, and that consequently [fol. 9] Section 1347.14 (d) of MPR 30 was by force of the Taft amendment invalid and ineffective between July 16, 1943, the date of enactment of that amendment, and September 11, 1943, the date of the Administrator's determination.

3. On July 29, 1944, defendants' protest was denied by the Price Administrator.

4. On August 26, 1944, defendants, being aggrieved by the denial of their protest, filed a complaint in the Emergency Court of Appeals pursuant to the provisions of Section 204 (a) of the Emergency Price Control Act. Said cause was docketed as No. 159 and entitled "Thomas Paper Stock Company, *et al.* v. Chester Bowles, Price Administrator".

5. On November 30, 1944, said cause came on for hearing at a session of the Emergency Court of Appeals at Chicago, Illinois, and was then taken under advisement.

6. On March 27, 1945, said cause was decided by the Emergency Court of Appeals in an opinion written by Chief Judge Maris and concurred in by Judge Lindley. Judge Laws dissented in part. A printed copy of the court's decision is attached hereto, marked "Exhibit A". As to defendants' first objection in their protest, all three judges concluded that the Taft amendment did not invalidate Section 1347.14 (d) of MPR 30 merely because the specification or standard employed by that section had not

previously been used by the waste paper industry or required by another governmental agency. As to the defendants' second objection, Chief Judge Maris and Judge Lindley concluded that such objection was not presented to the Price Administrator in a protest filed in time to enable him to consider and act upon it. From this conclusion Judge Laws dissented, saying among other things:

> "I therefore, believe it important in principle to hold that this Court should now pass upon an objection [fol. 10] to the Regulation, which seems of great importance to complainants and which in my judgment they have presented in accordance with authority granted by the Emergency Price Control Act of 1942."

7. As appears above, defendants' second objection to the Regulation was not considered upon its merits by the Emergency Court of Appeals. In that connection, however, Chief Judge Maris said:

> "We may consider that objection upon its merits only if and when a complaint asserting it is filed under Section 204 (e) (1) with leave of the United States District Court for the Northern District of Illinois after the complainants satisfy that court that the objection is asserted in good faith and that there is reasonable and substantial excuse for the complainants' failure to present it in a protest filed before September 11, 1943. *In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944 it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.*" (Emphasis supplied.)

Judge Lindley, concurring, said:

> "Congress enacted the amendments, intending to assure one in the position of complainants a right to be heard; that if, previously, complainants had no forum where they could present their second objection, they now enjoy such a right, by virtue of Section 204 (e)(1) and that we have jurisdiction solely by way of the avenue of approach provided therein."

Judge Laws said:

> "It may and probably will develop that the District Court will certify for our consideration the question in the case at bar, which the Court refuses to decide in the present proceeding."

8. The complaint against the Administrator which defendants now apply for leave to file in the Emergency Court of Appeals, will set forth the objection to the validity of [fol. 11] the Regulation, the merits of which objection were not passed upon by the Emergency Court of Appeals in said cause No. 159. Defendants represent that said objection is made in good faith, and that the fact that it is made in good faith is fully and adequately shown by the serious consideration heretofore given it by the Emergency Court of Appeals, as appears from the language of the separate opinions of each of the three judges of said court. That there is reasonable and substantial excuse for defendants' failure to present such objection in a protest filed in accordance with Section 203 (a) of the Emergency Price Control Act appears from the opinion of Chief Judge Maris, in which he says:

> "*In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944, it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.*" (Emphasis supplied.)

9. Defendants show the following as cause for not having filed this application within thirty days after arraignment: Section 204 (e)(1) was added to the Emergency Price Control Act by the Stabilization Act of 1944, which became effective July 1, 1944, which was more than thirty days after the arraignment herein. On July 1, 1944, there was already pending before the Price Administrator the protest hereinabove referred to. Defendants had reasonable and substantial excuse for not filing such protest prior to June 15, 1944 because upon the return of the indictment defendants demurred thereto upon the ground that Section 1347.14 (d) of Maximum Price Regulation No. 30 was invalidated by the Taft amendment, and at the time of the filing of the said demurrer it had been held in *United States*

v. *Pepper Bros.*, 52 F. Supp. 393, that the defense of the Taft amendment could be raised in the United States Dis-[fol. 12] trict Court, without resort to the protest procedure then provided by the Act. When it was held on May 3, 1944 by the Circuit Court of Appeals for the Third Circuit in *United States* v. *Pepper Bros.*, 142 F. (2d) 340, that the defense of the Taft amendment could not be made in the United States District Court, defendants prepared a protest based upon the Taft amendment and filed the same on June 15, 1944. Under the decision of the Emergency Court of Appeals in *R. E. Schanzer, Inc.*, v. *Bowles*, 141 F. (2d) 262, defendants' protest of June 14, 1944 was timely. It was held in that case there was no time limitation fixed by the Act upon the filing of a protest based on grounds arising, as in this case, more than sixty days after the issuance of a regulation. The bar to defendants' protest which has been set up by the majority opinion of the Emergency Court of Appeals in said cause No. 159 is a bar of which they had no notice from the language of the Act, as is pointed out by Judge Laws in his dissenting opinion in said case.

Wherefore, defendants pray that the leave above sought may be granted; and further pray that the court shall stay the present proceeding (1) during the period in which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted; and (2) during the pendency of any judicial proceeding instituted by the defendants under Section 204 (e)(1) of the Emergency Control Act with respect to the provisions of MPR 30 objected to as invalid, and until the exipration of the time allowed in Section 204 for the taking of further proceedings with respect thereto.

Thomas Paper Stock Company and Alvin E. Sandroff, by Gottlieb and Schwartz, David L. Bazelon, Jack H. Oppenheim, Their Attorneys.

[fol. 13] EXHIBIT A

Attached to application is a true copy of the printed opinion of the Emergency Court of Appeals in case No. 159.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 43 CR 735

UNITED STATES OF AMERICA, Plaintiff,

vs.

THOMAS PAPER STOCK COMPANY, a Corporation of the State of Illinois, and ALVIN E. SANDROFF, Defendants

ORDER—Entered May 10, 1945

This matter having come on to be heard upon defendants' Application for Leave to File a Complaint in the Emergency Court of Appeals pursuant to the provisions of Section 204 (e) (1) of the Emergency Price Control Act, as amended by the Stabilization Extension Act of 1944; and the plaintiff having been given due and timely notice of said application, [fol. 14] and now being represented in open court by the United States Attorney for the District and Division aforesaid; and the Court having considered said Application, and having heard the arguments of counsel, and now being fully advised in the premises, the court finds:

1. That defendants' objections to the validity of the provisions of Section 1347.14 (d) of Maximum Price Regulation No. 30 during the period July 16 to September 11, 1943, are made in good faith, said objections being based upon the fact that said Section fixes the maximum price for and standardizes unsorted waste paper in terms of a specification or standard, "No. 1 mixed paper", and that such provision was in violation of subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known as the Taft Amendment during the period July 16 to September 11, 1943. Defendants are alleged in several counts in the indictment herein to have violated said provision during said period.

2. That there is reasonable and substantial excuse for defendants' failure to present such objections in a protest

filed in accordance with Section 203(a) of the Emergency Price Control Act.

It is therefore ordered:

1. That the defendants, Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, be and they are hereby granted leave to file in the United States Emergency Court of Appeals a complaint against Chester Bowles, Price Administrator, setting forth said objections to the validity of the provisions of Maximum Price Regulation No. 30, which the defendants are alleged in several counts in the indictment herein to have violated.

2. That any and all further proceedings in the above entitled cause be and the same are hereby stayed during the statutory period in which such complaint may be filed in the [fol. 15] Emergency Court of Appeals pursuant to leave granted herein, and during the pendency of such complaint in the Emergency Court of Appeals and during the pendency of any judicial proceedings instituted by the defendants under paragraph (1) of subsection 204 (e) of the Emergency Price Control Act, as amended, with respect to the provisions of the Regulation above described, and until the expiration of the time allowed in Section 204 of said Act for the taking of further proceedings with respect thereto.

Enter:

Walter J. LaBuy, Judge

Dated this 10th day of May, 1945.

[fol. 16] [Stamp:] United States Emergency Court of Appeals. Filed Jun. 21, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY

v.

CHESTER BOWLES, Price Administrator

MOTION TO DISMISS COMPLAINT

[fol. 17] Now comes Chester Bowles, Price Administrator, Respondent, by his duly authorized attorney, and pursuant to Rule 13 of the Rules of this Court, moves the Court to dismiss the complaint filed herein.

A memorandum in support of this motion is submitted herewith.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 18] [Stamp:] United States Emergency Court of Appeals. Filed Jun. 21, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[fol. 19] Statement of the Case

For the purpose of this motion to dismiss the complaint, the factual statement of the case contained in the complaint is adequate.

Argument

The only question presented in this case is whether, under the terms of section 2(j)(3) of the Emergency Price Con-

trol Act, a maximum price regulation embodying a "standardization" of a commodity, legally issued prior to the passage of the Taft Amendment, became invalid on the enactment of that statute, and remained invalid until the Price Administrator publicly announced that he had determined that there was no practicable alternative, for effective price control, to the standardization embodied in the regulation. The question is one only of statutory construction. [fol. 20] Complainants have raised no constitutional issue in this proceeding, nor have they questioned the basis or the formal adequacy of the Administrator's determination that there was no practicable alternative.

The statutory language upon which Complainants rely is as follows:

> (2) (j) Nothing in this Act shall be construed . . .
> (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity.

It is our position that this language, considered in the context of the Emergency Price Control Act, does not require the publication of the Administrator's determination before a provision which standardizes a commodity becomes effective.

It is perfectly clear that the statutory language itself does not compel such a conclusion. Apt language for that purpose would be "No regulation issued under this Act shall, after the effective date of this subsection, standardize any commodity unless and until the Administrator shall have determined and declared that there is no practicable alternative for securing effective price control." Other amendments to the Emergency Price Control Act indicate that Congress well knew how to use language which would have the effect of rendering immediately invalid outstanding regulations (Cf. section 2(k-).

[fol. 21] The ineptness of Complainants' interpretation of the Taft Amendment becomes particularly apparent when it is examined in the context of the Emergency Price Control Act as a whole. The Act represents a departure in administrative rule making primarily because the formal record, justifying the administrative action, is developed in

an administrative proceeding occurring after, rather than before, the action is taken. Originally, and when the Taft Amendment was passed, the Act provided that the question of validity of a regulation could come before this Court only after the Administrator had an opportunity to reconsider his action in the light of objections presented in the protest proceeding. In this context, the protest proceeding would obviously be the place where the standardization provisions of a regulation would be challenged and it would be in such a proceeding that the Administrator, on the basis of the record, would make a final determination as to whether or not the standardization provisions under attack came within the purview of clause 3 or clause 4 of the Taft Amendment.[1] It would seem to follow from the pattern of the statute as a whole that the requirement of an explicit determination under clause 3 could be regarded at most as a prerequisite to judicial determination of the validity of a standardization provision.

[fol. 22] The legislative history of the Taft Amendment contains not the slightest hint that it was intended to effect a radical change in the procedural requirements of the statute. Nor does that history contain any suggestion that Congress intended (as Complainants must assume) any formal or procedural differences in the Administrator's mode of action under clause 3 of the Amendment as contrasted with clause 4. The fact that in one case the phrase "unless the Administrator shall determine" is used, whereas in the other it is not, is inherent in the difference in the conditions prerequisite to the use of standards and specifications under those clauses. Unlike the question whether certain standards and specifications were in general use in an industry prior to price control or their use required by another governmental agency, the existence or non-existence of a "practical alternative" is not susceptible of precise objective establishment but involves primarily an exercise of judgment. It was therefore natural for Congress to use the words "unless the Administrator shall determine" in clause 3 to indicate the exercise

[1] Section 204(e)(1) makes no essential change in the statute in this respect, since it too contemplates administrative proceedings in advance of final judicial determination whenever necessary for the development of an adequate record.

of judgment expected of the Administrator. The words "unless the Administrator shall determine" are thus not essentially different from the words "when in the judgment of the Administrator" used in section 2(a) of the Act.

The conflict between the procedure of the statute as a whole, and Complainants' interpretation of the Taft Amendment, is aggravated by the fact that the clause in question was imported into an established system of nation-wide price controls, built upon several hundred regulations, many of which contained provisions which raised some [fol. 23] question under the clause. Under Complainants' construction, the Taft Amendment would have seriously disrupted the price control structure. It has already been held in *United States* v. *Pepper Bros.*, 142 F. (2d) 340 (C. C. A. 3, 1944), that the Taft Amendment did not automatically repeal regulations such as Maximum Price Regulation No. 30, but at most rendered them invalid. But for all practical purposes, Complainants' interpretation of section 2(j)(3) would have the effect of repealing all standardizing provisions by rendering them unenforceable until the formal finding was made. Certainly the Administrator could not have, simultaneously with its becoming effective, examined all outstanding regulations and made the requisite declarations.

To prevent the Taft Amendment from being read in a manner inconsistent with the basic intention of continuity in price control, there are only two alternatives: (1) the Taft Amendment was not intended to apply to regulations outstanding at the time of the passage of the statute; or (2) the immediate announcement of a determination under clause 3 was not a prerequisite to the continued effectiveness of outstanding regulations containing standardization provisions. The Administrator has always been of the opinion that the Taft Amendment was applicable to regulations in existence on July 16, 1943. This view seems required both by the language of section 2(j) and by the legislative history thereof. It may be observed, however, that if the Administrator is not correct in this interpretation, Complainants' contention necessarily falls.

[fol. 24] The second alternative appears to be the correct one. It gives section 2(j)(3) a meaning and application consistent with the Act of which it forms a part, and consistent with its language. It seems hardly necessary to add that this construction does not deprive section 2(j)(3) of

significance. A person subject to a regulation which, in his opinion, uses specifications not previously in general use in the trade and not previously required by another governmental agency, may in protest proceedings challenge the Administrator's authority to use such specifications under either clause 3 or clause 4 of the Taft Amendment. If the Administrator relies upon clause 3, the protestant may, as we understand it, bring before this Court the reasonableness of the Administrator's determination that there is no practicable alternative for effective price control.

The issuance on September 11, 1943, of an amendment to the preamble of Maximum Price Regulation No. 30, stating the Administrator's determination, and a supplementary statement of considerations setting forth the reasons therefor, cannot in any way be said to imply an acceptance by the Administrator of the position here advanced by [fol. 25] plaintiffs. The Administrator amended the preambles, and issued supplementary statements of considerations, in connection with regulations falling within the terms of clause 4 of the Taft Amendment, although this contains no language which could possibly be construed as requiring the declaration of a finding or a determination. (See paragraphs (a) and (b) of Supplementary Order No. 64 (8 F. R. 12554)).

Our position is, we submit, fortified by recent decisions in which the Supreme Court has emphasized the power of courts, in dealing with problems arising out of the review of administrative action, to avoid the application of mechanical concepts which would preclude the achievement of a result in harmony with the objects of the statute. Thus, in *United States* v. *Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1939), the Court held that although an order of the Secretary of Agriculture was invalid for failure to afford the parties adequate hearing, the market agencies to which the order applied were not automatically entitled to have disbursed to them a fund paid into court representing the difference between the rates in effect prior to the Secretary's order and the lower rates prescribed by that order. The fund was held by the court until determination would be made, by the Secretary, after full hearing, as to the propriety of the rates specified in the "invalid" order.

[fol. 26] An analogous situation was presented to the Court in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215, 1222-1223 (1944), with the important difference that in this case there was no fund in *custodia legis*. The Court held invalid a definition issued by the Administrator of the Wage and Hour Division under the Fair Labor Standards Act, but directed that the case be remanded to the district court and held by it until the Administrator made a valid definition, in the light of the Court's decision, the rights of the parties to the suit to be determined in accordance with the new definition. In discussing the authorities supporting the power of the courts to permit the retroactive validation of past acts, the Court significantly observed that

> * * * in habeas corpus proceedings, even though a petitioner was unlawfully in custody, this Court has allowed continued retention of custody until a valid order could be made.

citing *Mahler* v. *Eby*, 264 U. S. 32, 44 S. Ct. 263 (1924). Cf. *Atlantic Coast Line S. Co.* v. *Florida*, 295 U. S. 301, 55 S. Ct. 713 (1935).

The foregoing considerations are particularly pertinent in a case like the present where the Administrator, at the time of the issuance of the Regulation, necessarily made a determination substantially identical to that required of him by clause 3 of the Taft Amendment. The Administrator never enjoyed unlimited power to standardize commodities. His power to do so stemmed from section 2(g) of the Act which provides:

> [fol. 27] Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

Obviously, he would have no authority to standardize wastepaper unless he considered such action to be necessary for effective price control. The Administrator so stated his position in discussing the Taft Amendment in his Seventh Quarterly Report to the Congress (pp. 19-20).

Conclusion

For the foregoing reasons the complaint should be dismissed.

Respectfully submitted, Richard H. Field, General Counsel; Nathaniel L. Nathanson, Associate General Counsel. Jacob D. Hyman, Assistant General Counsel; Josephine H. Klein, Attorney, Office of Price Administration.

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fol. 28] [Stamp] United States Emergency Court of Appeals. Filed June 8, 1945. Herman G. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Request for Hearing at Chicago, Illinois

Now come the complainants, by their attorneys, and respectfully request that the hearing in the above entitled cause be held at Chicago, Illinois.

Respectfully submitted, David L. Bazelon, Jack H. Oppenheim.

[fol. 23] [File endorsement omitted]

[fol. 24] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

[Title omitted]

MOTION TO STAY THE PROCEEDING—Filed June 28, 1945

Now come the complainants, by their attorneys, and, pursuant to Rule 14 of this Court, move the Court to stay the proceeding until the final disposition by the Supreme Court of the United States of the case there pending on a writ of certiorari directed to this Court for the purpose of reviewing the judgment of this Court entered on March 27, 1945, dismissing the complaint in case No. 159 entitled "Thomas Paper Stock Company, *et al. vs.* Chester Bowles, Price Administrator."

[fol. 25] The grounds upon which this motion is based are:

1. Following the entry of judgment on March 27, 1945 by this Court in case No. 159, complainants, on April 13, 1945, filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, an application for leave to file a complaint in this Court under Section 204 (e) of the Act, as more fully appears on pages 7-12 of the Appendix to the complaint heretofore filed herein. Because of the absence of District Judge Walter J. LaBuy, to whom the case was assigned, the hearing on said application was postponed to May 10, 1945.

2. Meanwhile, on April 26, 1945, the time within which complainants could file a petition for a writ of certiorari from the judgment of this Court in case No. 159 expired, and before such expiration of time complainants on that day did file such a petition in the Supreme Court of the United States, based upon this Court's dismissal of the second objection relied upon in case No. 159.

3. On May 10, 1945, while said petition for a writ of certiorari was still pending and undetermined, District Judge Walter J. LaBuy granted leave to complainants to file a complaint under Section 204 (e) in this Court, as more fully appears on pages 13-15 of the Appendix to the complaint.

4. On or about May 25, 1945, the brief of the respondent in opposition to petition for a writ of certiorari was filed in the Supreme Court of the United States by the Acting Solicitor General, Hugh B. Cox.

5. On May 26, 1945, the Acting Solicitor General sent the following letter to the Clerk of the Supreme Court of the United States:

[fol. 26] May 26, 1945.

Charles Elmore Cropley, Esq., Clerk, Supreme Court of the United States, Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, et al. vs. Chester Bowles, Price Administrator

DEAR MR. CROPLEY:

We have just been advised that in *United States* v. *Thomas Paper Stock Company*, a criminal case in the United States District Court for the Northern District of Illinois, referred to in our brief in opposition to certiorari in No. 1206 (p. 4), the District Court on May 10, 1945, granted leave to defendants, petitioners in No. 1206, to file a complaint in the Emergency Court of Appeals pursuant to Section 204(c) of the Emergency Price Control Act, and that the proceedings in the District Court have been stayed pursuant to the same section.

Will you kindly bring this information to the attention of the Court in connection with its consideration of the petition and brief in opposition in No. 1206. See, particularly, the Government's brief in opposition at pages 7-10.

A copy of this letter is being sent to counsel for petitioners.

Very truly yours, Hugh B. Cox, Acting Solicitor General.

[fol. 27] 6. On May 29, 1945, the following reply to the foregoing letter was sent to the Clerk of the Supreme Court of the United States:

May 29, 1945.

Charles Elmore Cropley, Esq., Clerk, Supreme Court of the United States, Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, et al. vs. Chester Bowles, Price Administrator

DEAR MR. CROPLEY:

We have received a copy of Acting Solicitor General Cox's letter of May 26, 1945, calling attention to the order entered by the United States District Court on May 10, 1945.

In this connection, we desire to point out that notwithstanding the granting of leave to file a complaint in the Emergency Court of Appeals pursuant to Section 204 (e) of the Emergency Price Control Act, the question still remains whether the Emergency Court of Appeals has jurisdiction of such a complaint in the situation in the case at bar. If, as we contend in the Petition for Certiorari, the Emergency Court had jurisdiction of the complaint filed pursuant to Section 204 (a), and should have decided said complaint upon the merits, then it would not have jurisdiction of a complaint filed pursuant to leave granted under Section 204(e).

We also desire to point out that the granting of leave under Section 204(e) in the criminal case affords no relief against the invalidity of the same regulation which is involved in the treble damage action referred to in the Petition for Certiorari.

A copy of this letter is being sent to the Acting Solicitor General.

Yours very truly, Claude A. Roth, Counsel for Petitioner.

[fol. 28] 7. On June 4, 1945, said petition for a writ of certiorari was granted by the Supreme Court of the United States.

8. Complainants have ascertained from the Clerk of the Supreme Court of the United States that the letters set

forth in paragraphs 5 and 6 above were delivered to the Justices of the Supreme Court of the United States prior to the granting of the writ of certiorari.

9. As hereinabove appears, the Supreme Court of the United States has taken jurisdiction of the matter. One of the questions which it will resolve is whether this Court had jurisdiction of the second objection relied upon in the complaint filed under Section 204 (e). If the Supreme Court should determine that this Court did have jurisdiction thereof and that it erroneously dismissed the complaint as to that objection, without consideration of the merits, the result will be a holding that this Court does not have jurisdiction of the present complaint filed under Section 204 (e). In that event, it would be erroneous for this Court to enter any order either granting or denying upon the merits the relief sought in the present complaint; and the only proper order would be a dismissal of the present case for want of jurisdiction.

If this proceeding is not stayed, a judgment entered herein in favor of either party may be inconsistent with the judgment of the Supreme Court of the United States, and thus further prolong and complicate the litigation.

Wherefore, complainants pray that an order be entered by this Court staying the proceeding until the final disposition by the Supreme Court of the United States of the aforesaid cause there pending.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants. Address for Service: 231 South La Salle Street, Chicago 4, Illinois.

[fol. 29] In United States Emergency Court of Appeals

Motion for Enlargement of Time—Filed June 28, 1945

Now come the complainants, by their attorneys, and, pursuant to Rule 22 (c) of this Court, move this Court to enlarge the period allowed by Rule 14 (b) and (c) within which complainants may file objections to respondent's motion to dismiss and a brief in support thereof.

The grounds upon which this motion is based are:

1. Complainants have filed simultaneously herewith a motion to stay the proceeding. If the latter motion is

granted, there will be no occasion for the Court to consider respondent's motion to dismiss until after the final disposition by the Supreme Court of the United States of the case there pending on a writ of certiorari, more fully described in complainants' motion to stay the proceeding.

2. In the event that complainants' motion to stay the proceeding is granted, complainants request that this Court simultaneously enter an order retaining jurisdiction to fix the time after the disposition of said case in the Supreme Court of the United States within which complainants may file their objections to respondent's motion to dismiss and brief in support thereof. In the event that the judgment in case No. 159 is reversed, and the cause remanded, it will become unnecessary for complainants to file objections to respondent's motion to dismiss the complaint herein.

3. In the event that complainants' motion to stay the proceeding is denied, complainants request that this Court enter an order extending complainants' time to file objections to respondent's motion to dismiss and a brief in support thereof until July 31, 1945; and in support of this request complainants' attorneys represent unto the Court [fol. 30] that they are presently under pressure to meet the following deadlines:

(1) Not later than July 22, 1945, they must file in the United States Circuit Court of Appeals for the Seventh Circuit a transcript of record in a case which occupied three weeks of trial, in which there are some 1,600 pages of testimony and numerous voluminous exhibits;

(2) Not later than July 20, 1945, they must file in the United States Circuit Court of Appeals for the Sixth Circuit an assignment of errors and bill of exceptions in a criminal case involving O. P. A. regulations;

(3) Not later than July 1, 1945, they must file a complaint in this Court under Section 204(a) of the Act based upon the dismissal of a protest by the Price Administrator on June 1, 1945 following the filing of a petition for mandatory relief in this Court.

(4) During the same period they must work on the preparation of a brief to be filed in the Supreme Court of the United States in the matter of the review of the judgment of this Court in case No. 159.

In addition to the foregoing, complainants' attorneys must spend considerable time in research into the legislative history of the Taft Amendment to the Emergency Price Control Act, as well as in other legal research, so that they may be in a position to adequately present their objections to respondent's motion to dismiss the complaint herein.

Wherefore, complainants pray that this Court will enter such order consistent with the foregoing as to this Court may seem proper.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants. Address for Service: 231 South La Salle Street, Chicago 4, Illinois.

[fol. 37] [Stamp] United States Emergency Court of Appeals. Filed Jun. 5, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Answer to Complainants' Motions to Stay the Proceeding and for Enlargement of Time

Now comes Chester Bowles, Price Administrator, by his duly authorized attorney, and presents the following objections to Complainants' motion to stay the proceeding until the final disposition by the United States Supreme Court of the case there pending on a writ of certiorari directed to this Court for the purpose of reviewing the judgment of this Court entered on March 27, 1945, dismissing the complaint in case No. 159, entitled Thomas Paper Stock Company, et al. v. Chester Bowles, Price Administrator.

1. Complainants advance as the sole ground for their motion the suggestion that if the Supreme Court should determine that this Court had jurisdiction to pass upon the second objection relied upon in the complaint in case No. 159, the result would be a holding that this Court would not have jurisdiction of the present complaint filed [fol. 38] under section 204(e). We submit that this suggestion is erroneous. This Court now has jurisdiction of the complaint herein filed under section 204(e) and a decision by the Supreme Court with respect to this Court's jurisdiction on the previous complaint will not effect this Court's jurisdiction on the present complaint. If the Supreme Court should determine, while the complaint herein was still pending, that this Court did have jurisdiction of the previous complaint, the result would merely be that there would be two complaints pending in this Court raising the same objections and it would be within this Court's discretion to determine which should go forward. Even

if it had been unnecessary and, in a sense, erroneous for the district court to grant leave to present in a 204(e)(1) proceeding objections which had already been presented in a protest filed in accordance with section 203(a), such error would not go to the jurisdiction of either the district court or of this Court. It would be comparable to the error which would occur if the district court were to find that there is reasonable and substantial excuse for failure to present an objection in the protest proceeding when there was in fact no basis for such finding. In such a case this Court would certainly not regard the question as one of its own jurisdiction justifying the review of the district court's finding.

2. The peculiar situation arising in this case is not the only one which might lead to the pendency of two complaints in this Court by the same parties, presenting the same objections, one under section 204(a) and the other under section 204(e)(1). It will be noted that section 204(e)(2) contemplates a stay of enforcement proceedings [fol. 39] during the pendency of a protest, or complaint following denial of a protest, only if the protest was properly filed under section 203 prior to the institution of the enforcement proceedings. The district court might, therefore, in order to justify granting a stay, consider it proper to grant leave to file a complaint setting forth objections which were already presented in a protest proceeding or even in a complaint in this Court but which had not been presented prior to the institution of the enforcement proceeding. In such a case, too, it would be within the discretion of this Court to determine which case should go forward.

This particular case illustrates the foregoing point. Complainants' protest was filed on June 15, 1944, whereas the complainants had been indicted in the United States District Court for the Northern District of Illinois on December 17, 1943. Thus, the filing of the protest would not have properly been a ground for a stay in the enforcement proceeding even if all the objections included therein were presented in accordance with section 203(a). The district court might, therefore, consistently with the statute, have granted leave to present the same objections in a complaint filed under section 204(e)(1), if it were satisfied that there was reasonable and substantial excuse for failure to file a

protest before the institution of enforcement proceedings and if it wished to provide a proper basis for a stay of the enforcement proceedings.

3. It is suggested in the letter of Mr. Roth to Mr. Cropley, which appears on page 4 of Complainants' motion that "the granting of leave under Section 204(c) in the criminal [fol. 40] case affords no relief against the invalidity of the same regulation which is involved in the treble damage action" pending against the Complainants. This suggestion too is apparently based upon a misreading of the statute, which provides that a determination of invalidity of a particular regulation shall be a basis for dismissal of any pending proceeding to the extent that it is based upon such provision. A determination in favor of the complainants herein will provide complete protection to the Complainants in the treble damage action as well as in the criminal case providing that it is arrived at while the treble damage action is pending. It appears, therefore, that there is every reason, from the point of view of the legitimate interests of the Complainants as well as of the public interest in expeditious determination of this litigation, that proceedings upon this complaint should not wait upon determination by the Supreme Court of the case pending therein.

Respondent does not object to Complainants' motion for enlargement of time until July 31, 1945 for the filing of objections to Respondent's motion to dismiss and a brief in support thereof. Respondent wishes to point out, however, that the question presented by the Complainants has already been fully briefed and argued before this Court. Because of the public interest in expeditious determination of this litigation, which is now the basis for delay of enforcement proceedings pending against Complainants, and also in view of the public interest in curtailing unnecessary travel, Respondent respectfully suggests that oral argument on the motion may properly be dispensed with.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 41] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 10, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J., and Magruder, McAllister, and Lindley, JJ.

ORDER

Upon consideration of Complainants' motion to stay the proceedings and for enlargement of time for filing their objections to Respondent's motion to dismiss the complaint and their brief in support thereof, and of Respondent's answer to said motions,

It is Ordered that Complainants' motion to stay the proceeding be, and the same hereby is, denied.

It is Further Ordered that Complainants' motion for enlargement of time for filing their objections to Respondent's motion to dismiss the complaint and their brief in support thereof be, and the same hereby is, granted, and the time for filing the same is hereby enlarged to July 31, 1945.

By the Court.

Teste: Herman C. Beasley, Clerk.
July 10, 1945.

[fol. 42] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 27, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

MOTION FOR ENLARGEMENT OF TIME

Now come the complainants by their attorneys and move the Court for entry of an order extending to August 7, 1945, the time within which complainants may file their objections to respondent's motion to dismiss.

In support of this motion complainants' attorneys say that the enlargement of time is required by them for the adequate preparation of their objections. A stipulation of the parties for such extension is filed herewith.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants.

[fol. 43] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 27, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY

v.

CHESTER BOWLES, Price Administrator

STIPULATION

It is hereby stipulated and agreed between the Complainants, by their duly authorized attorneys, and the Price Administrator, by his duly authorized attorney, that the time

within which the Complainants are required to file their Objections to the Motion to Dismiss the Complaint may be extended to and including August 7, 1945.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants; Nathaniel L. Nathanson, Attorney for Price Administrator.

Dated: July 27, 1945.

[fol. 44] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 27, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

ORDER

Upon consideration of Complainants' motion for enlargement of time to and including August 7, 1945, within which to file their objections to the motion to dismiss the Complaint, and of Stipulation filed herein by the parties agreeing to the enlargement,

It is Ordered that Complainants' motion be, and it hereby is, granted.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk, by J. Frederick Mattingley, Chief Deputy Clerk.

July 27, 1945.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

OBJECTIONS TO MOTION TO DISMISS COMPLAINT—Filed August 7, 1945

Now come the complainants by their attorneys, and object to the motion to dismiss the complaint for the reasons set forth in the memorandum submitted herewith.

Respectfully submitted, Homer Cummings, Jack H. Oppenheim, Attorneys for Complainants.

[fol. 38] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

[Title omitted]

MEMORANDUM IN SUPPORT OF OBJECTIONS TO THE MOTION TO DISMISS COMPLAINT—Filed August 7, 1945

Counsel for the Administrator correctly state that the question presented in this case is one only of statutory construction. The precise question, however, is not—as put by them—whether a *public announcement* of the determination required by Section 2(j)(3) is made a condition precedent to standardization. The question presented is whether the statute does not make it a condition precedent to standardization that the required determination be in fact made and officially expressed of record, even though not publicly announced.

We do not complain of the failure to make a "publicly announced" determination. What we complain of is that the required determination was not in fact made prior to September 11, 1943, and that until it was made Section 1347.14(d) of MPR 30 was invalid.

[fol. 39] *The Actual Issue.*—The real issue is clear. It is the Administrator's contention that he was not required to "make a final determination as to whether or not the standardization provisions under attack came within the purview of clause 3 or clause 4 of the Taft amendment" prior to the initiation of a protest proceeding (Adm. Mem. p. 3). It is the complainants' contention

that the Administrator cannot thus postpone the making of the required determination. We submit that the Administrator is under a statutory injunction *affirmatively to determine* that there is no practicable alternative to standardization *before, and not after,* he issues an order fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards not in general use in the trade or industry affected, and which have not previously been promulgated and their use lawfully required by another Government agency.

Clauses (3) and (4) of Section 2(j) Construed Together. The construction here contended for by complainants follows inescapably from the construction placed upon section 2(j) of the Act by this Court in its decision in case No. 159. There the Court sustained the Administrator's contention that "there is a third situation in which Section 2(j) authorizes him to make use of specifications or standards for the purpose of fixing maximum prices. * * * clauses (3) and (4) of Section 2(j) are to be read together as providing three alternative situations in any one of which he is authorized to employ specifications or standards in connection with price control." We submit that if clauses 3 and 4 are to be read together, and their arrangement in the disjunctive ignored, then the phrase "prior to such order" which appears in clause 4 must be linked, as a matter of logic, to the clause "unless the Administrator shall determine" which appears in clause 3. That is to say, a logical [fol. 40] reading of clauses 3 and 4—taken together to express the three situations in which the Administrator may use specifications or standards—would be as follows:

> "Nothing in this Act shall be construed * * * as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order (1) in general use in the trade or industry affected, or (2) promulgated and their use lawfully required by another Government agency, or (3) determined by the Administrator to be essential because no practicable alternative exists for securing effective price control with respect to such commodity."

The Administrator's express determination that there is no practicable alternative is a made condition, on a par with the other two conditions, under which standardization becomes permissible. Whichever of the three conditions is met, it must be capable of objective ascertainment. It is obviously capable of ascertainment whether the standards or specifications have been in general use in the trade or industry affected. It is likewise ascertainable whether they have been promulgated and their use lawfully required by another Government agency. It must by the same token be ascertainable, when neither of the first two conditions is met, that the Administrator *has in fact determined* that no practicable alternative exists, and that such actual determination was made *prior to the issuance of the standardization order.* To say that the Administrator's determinationsthat there is no practicable alternative need not be officially expressed of record prior to the effectiveness of a standardization order, is to destroy the logic of the construction under which clauses 3 and 4 are read together and their arrangement in the disjunctive ignored.

[fol. 41] *The Function of the Protest Proceedings.*—The Administrator's contention that "a final determination" may be postponed until the matter is presented for his consideration in a protest proceeding simply begs the question. "The Act," argues the Administrator, "represents a departure in administrative rule-making primarily because the formal record, justifying the administrative action, is developed in an administrative proceeding occurring after, rather than before, the action is taken. Originally, and when the Taft amendment was passed, the Act provided that the question of validity of a regulation could come before this Court only after the Administrator had an opportunity to reconsider his action in the light of objections presented in the protest proceeding. In this context, the protest proceeding would obviously be the place where the standardization provisions of a regulation would be challenged * * *." This argument might have some basis if the validity of the Administrator's determination made on September 11, 1943, were the subject of inquiry. In such a case, the question presented would not be whether the Administrator had in fact made the required determination, but whether the determination was an arbitrary or unreasonable one. Then, perhaps, it might be said that "the formal record, justifying

the administrative action, is developed in an administrative proceeding occurring after, rather than before, the action is taken." Upon judicial review, this Court could recognize that there was some conflict on the question whether there was a practicable alternative to effective price control, yet at the same time find that the Administrator's determination that there was no practicable alternative was not an arbitrary or unreasonable one. The record made in the protest proceeding would be the basis of the judicial determination of the validity of the standardization provision.

[fol. 42] But it is an unwarranted distortion of the pattern of the statute to say that the requirement of an explicit determination under clause 3 of the Taft amendment may be regarded, as the Administrator contends, "at most as a prerequisite to judicial determination of the validity of a standardization provision."

The type of evidence which it is contemplated by the Act will be developed in a protest proceeding—the type of evidence which would give the Administrator "an opportunity to reconsider his action in the light of objections presented"—is clearly irrelevant and immaterial to the question whether the explicit determination required by clause 3 has in fact been made.

The Legislative Intent is Clear.—The language used in the statement of the Managers on the part of the House in the Conference Report accompanying H. J. Res. 147 on July 8, 1943 (H. Rep. No. 697, 78th Cong., 1st Sess., p. 3) sustains our contention:

> "The third clause requires that *before* any commodity may be standardized, the Administrator *must determine* that no practicable alternative method exists for securing effective price control of the commodity." (Emphasis added.)

In the concluding paragraph of the same statement it is said that the enactment of the provision in question makes clear "the circumstances under which the Administrator may Act."

The Administrator's Recognition of the Legislative Intent.—The clear legislative intent thus expressed is that the Administrator's determination is a *condition precedent* to the effectiveness of any attempted standardization. This

was recognized by the Administrator himself on September 11, 1943, in the statement of reasons involved in the issuance of Supplementary Order No. 64 (incorporating by reference the same as those for the issuance of Supple- [fol. 43] mentary Order No. 55). The discussion in the latter document of the legislative history of clause 3 of the Taft amendment unequivocally asserts that the Administrator has authority to establish standards only when he makes the required determination. Thus it is said in the fifth paragraph of the Administrator's statement:

> "The clause recognizes the Administrator's authority to establish standards *whenever he determines* "that no practicable alternative exists for securing effective price control with respect to a commodity." (Emphasis added.)

Again, in the fourteenth paragraph of the same document, it is recognized that the determination is a condition precedent to standardization:

> "Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 *unless he can bring his action within the exception to clause 3 by making a determination* that no practicable alternative to standardization exists for securing effective price control." (Emphasis added.)

Indeed, the fact that the making of a determination is a condition precedent, is declared in so many words by the Administrator in the sixteenth paragraph of the same document, when he describes the requirement as a "*condition*" which must be "*met*" before effectuating standardization.

The Basic Fallacy of the Administrator's Contention.— It is the Administrator's position, in effect, that he can ignore the requirements of the Taft amendment until such time as the question is raised by protest and that then for the first time, he can "declare" his determination of compliance with the Taft amendment. Obviously if no protest were ever filed, we would have a situation where the Ad- [fol. 44] ministrator was never required to make the determination which the statute specifically requires. This

would leave the Administrator in the position of being able to standardize a commodity at will, regardless of whether there was a practicable alternative thereto. The restrictions placed upon him by the Taft amendment would thereby lose all meaning, in that the congressional intention to prevent disruption of industry practices by standardization, except as a last resort when no alternative to effective price control existed, would be completely nullified. *The statutory injunction to the Administrator to affirmatively make a determination before resorting to standardization would be transformed into a statutory permission to standardize any commodity until such time as a protestant is able to show that there is a practicable alternative to such standardization.* A construction of the Taft amendment which leads to this result cannot be sustained.

Pre-existing Regulations Are Affected.—Certainly the Congress enacted the Taft amendment specifically to limit the Administrator's authority. It intended that he make the determination *before* issuing the regulation, and not afterward. This intention was applicable to pre-existing as well as to new regulations. The Administrator argues that he could not, simultaneously with the Taft amendment's becoming effective, have examined all outstanding regulations and made the requisite determinations. This is true, and serves to emphasize the fact that he did not, in the present case, make even an unexpressed determination. It is not true, however, that the Congress had not considered the impact of the Taft amendment upon existing regulations. In the statement of the Managers on the part of the House in the Conference Report it was said:

> "The purpose of this amendment to section 2 of the Emergency Price Control Act of 1942, as amended, [fol. 45] is to *meet the objection that the Price Administrator has exceeded the limitations expressed in section 2 (h) of that act in issuing certain regulations already promulgated.*" (Emphasis added.)

The Administrator argues that under our interpretation the Taft amendment would have seriously disrupted the price control structure. It is apparent, however, that the Congress was of the opinion that the Administrator himself had seriously disrupted the kind of price control struc-

ture intended originally to have been limited by section 2 (h) of the Act. The Administrator's reliance upon "the basic intention of continuity in price control" simply overlooks the obviously basic intention of continuity of *lawful* price control.

The considerations which led to the statutory requirement of an express determination outweighed such considerations as that a short time might elapse between the passage of the amendment and the Administrator's action in pursuance thereof, during which time a limited number of regulations were open to attack. The situation is no different than that presented when the Administrator is considering the issuance of a new regulation setting up commodity standards. There is necessarily involved a period of time during which the Administrator must examine into the question of practicable alternatives to standardization. During that time, and before he makes his determination, the issuance of the regulation is postponed or delayed.

The Determination Must Be An Express One.— It is well settled that where a statute delegates authority to an administrative body to make orders or issue regulations upon the basis of an administrative finding or determination of the existence of certain facts or circumstances, the omission to make a required finding or determination renders the orders or regulations invalid. Where a stat-[fol. 46]-ute requires an administrative finding, such finding must be *express* rather than implied. *Wichita Railroad and Light Company* v. *The Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51 (1922).

The Administrator cites *United States* v. *Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1939), and *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215, 1222-1223 (1944), as emphasizing the power of courts "to avoid the application of mechanical concepts which would preclude the achievement of a result at harmony with the objects of the statute." We submit that ours is not an attempt to apply a mechanical concept which would preclude the achievement of a result in harmony with the objects of the Taft amendment. On the contrary, we believe that the legislative history of that amendment emphasizes the congressional intent to require "that *before* any commodity may be standardized, the Administrator *must determine* that no practicable alternative method exists for securing effec-

tive price control of the commodity." The cases cited by the Administrator are not in point.

Section 2 (j) Is Not An Automatic Repealer.—The Administrator misstates the case when he says that "complainant's interpretation of Section 2 (j) (3) would have the effect of repealing all standardizing provisions by rendering them unenforceable until the formal finding was made."

Our interpretation of section 2 (j) (3) is not in conflict with the holding in *United States* v. *Pepper Bros.*, 142 F. 2d 340 (C. C. A. 3, 1944). Under that decision, a regulation which fails to satisfy the requirements of the Taft amendment is enforceable *during the period in which the invalidity of the regulation has not yet been established by judgment of the Emergency Court of Appeals.* At the time of the *Pepper* decision it was still an open question as to whether, once the invalidity had been determined, the judg- [fol. 47] ment of invalidity could be used as a defense to a criminal prosecution based upon violations which occurred prior to the judgment of invalidity. That question is no longer open, in view of the provisions of section 204 (e) (2). Pending enforcement proceedings based upon violations occurring before the adjudication of invalidity must be dismissed. Our interpretation of section 2 (j) (3) makes consonant the holding in the *Pepper* case with the provisions of section 204 (e) (2).

Conclusion

For the foregoing reasons, the motion to dismiss the complaint should be denied.

Respectfully submitted,

HOMER CUMMINGS,
JACK H. OPPENHEIM,
Counsel for Complainants.

[fol. 56] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 7, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

MOTION FOR ORAL ARGUMENT

Now come the complainants in the above-entitled case by their counsel, Homer Cummings and Jack H. Oppenheim and move that the above-entitled case be placed on the hearing calendar at Washington, D. C. for argument on the Price Administrator's motion to dismiss and the complainants' objections thereto.

In support of such motion the complainants show:

1. The issue presented on the motion to dismiss and the objections thereto appears to be determinative of the case since it is the understanding of counsel that the Office of Price Administrator will raise no serious question as to the correctness of the allegations of fact contained in the complaint nor any other question of law with respect thereto. In this event, of course, no further oral argument on the merits would seem necessary or desirable.

[fol. 57] 2. Fixing of Washington, D. C. as the place for argument will eliminate any question as to imposition of additional burden on transportation facilities and will obviate any difficulty that counsel for the Price Administrator might have in obtaining transportation.

Respectfully submitted, (S.) Homer Cummings, Jack H. Oppenheim, Attorneys for Complainants.

[fol. 58] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 7, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

ORDER

It is ordered that Respondent's motion to dismiss the complaint in the above entitled case be assigned for determination to a division of the Court consisting of Chief Judge Maris, Judge Lindley, and Judge Laws.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk.
August 7, 1945.

* * * * * * *

[fol. 59] Friday, September 7, 1945.

* * * * * * *

Pursuant to adjournment and call of the Chief Judge, the Court met at 10:30 A. M., at Washington, D. C.

* * * * * * *

Before Honorable Albert B. Maris, Chief Judge, Honorable Walter C. Lindley and Honorable Bolitha J. Laws, Associate Judges

* * * * * * *

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Argument on Respondent's motion to dismiss the complaint commenced by Mr. Nathaniel L. Nathanson, for Respondent, continued by Mr. Jack H. Oppenheim, for Complainant, and concluded by Mr. Nathaniel L. Nathanson, for Respondent.

* * * * * * *

[fol. 50] IN UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY AND ALVIN E. SANDROFF

vs.

CHESTER BOWLES, Price Administrator

Heard at Washington September 7, 1945

Before Maris, Chief Judge, and Lindley and Laws, Judges.

Mr. Jack H. Oppenheim, with whom *Mr. Homer Cummings* was on the brief, for the complainants.

Mr. Nathaniel L. Nathanson, Associate General Counsel, with whom *Messrs. Richard H. Field*, General Counsel, *Jacob D. Hyman*, Assistant General Counsel, and *Miss Josephine H. Klein*, Attorney, all of the Office of Price Administration, were on the brief, for the respondent.

OPINION OF THE COURT SUR MOTION TO DISMISS—Filed October 5, 1945

By MARIS, *Chief Judge*.

This complaint, which has been filed under Section 204(e)(1) of the Emergency Price Control Act with leave of the United States District Court for the Northern District of Illinois, properly brings to us for consideration the objection of the complainants to Section 1347.14(d) of Maximum Price Regulation No. 30, Wastepaper, which we held we had no power to consider in connection with their prior complaint filed under Section 204(a). See Thomas Paper Stock Co. v. Bowles, 148 F. 2d 831 (1945). The objection is that by virtue of the Taft Amendment, which added Subsection (j) to Section 2 of the Emergency Price Control Act, Section 1347.14(d) of MPR 30, which fixed the maximum price for unsorted wastepaper in terms of a specification or standard, was rendered invalid from July 16, 1943, the date of enactment of the Taft Amendment, until September 11, 1943, the date on which the Price Administrator made a formal determination that no practicable alternative thereto existed for securing effective price control with respect to such wastepaper.

So far as material Section 2(j), the Taft Amendment, provides:

> "(j) Nothing in this act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing [fol. 51] any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

In the complainants' prior case (148 F. 2d 831) we decided that clauses (3) and (4) which we have just quoted must be read together as providing three alternative situations in any one of which the Administrator is authorized to employ specifications or standards in connection with price control. We accordingly held that Section 2(j) did not operate to invalidate Section 1347.14(d) of MPR 30 merely because the specification or standard employed by that section had not previously been used by the wastepaper industry or required by another Government agency, the two situations described in clause (4). The present case involves the effect of clause (3) upon the validity of Section 1347.14(d) of the regulation. In order to frame the precise question which is presented for decision the exact facts from which it arises must be stated.

Section 1347.14(d) of MPR 30 was issued and in force prior to the passage of the Taft Amendment. Its validity prior to the passage of that Amendment is not questioned. It made use of a specification or standard in fixing the maximum prices for unsorted wastepaper. No practicable alternative to the use of this specification or standard existed for securing effective price control with respect to such wastepaper. The Administrator expressly so determined in his supplementary statement of considerations to MPR 30 issued September 11, 1943 and the validity of his determination is not questioned by the complainants here.

On the contrary they concede that by reason of it the regulation was entirely valid under Section 2(j)(3) after September 11, 1943.

It will be observed that the application of Section 2(j)(3) to a new price regulation issued after its enactment is not involved in this case. Nor do we have before us a regulation which uses a specification or standard where there is in fact another practicable alternative to its use for securing effective price control. The narrow question which this case presents is whether a previously valid price regulation which, because there was no practicable alternative for securing effective price control, used a specification or standard not previously used or required, was rendered invalid by subsection (j)(3) of Section 2 from the time of the enactment of that subsection until the time when the Administrator determined and recorded the fact that no such alternative to the use of the specification or standard existed. In other words, did the Taft Amendment require a prior determination by the Administrator of that fact in the case of a regulation which had been validly issued before the enactment of the Amendment and did it operate to invalidate the regulation in the interim?

We do not think that the Taft Amendment can properly be construed to have that effect. Its purpose as disclosed in clauses (3) and (4) was to prohibit the use by the Administrator of specifications and standards in all except three specified cases. These excepted cases were: (1) if specifica- [fol. 52] tions or standards were already in general use in the industry, (2) if their use had already been lawfully required by another Government agency, or (3) if there was no practicable alternative to their use for securing effective price control. Obviously it was not the purpose of Congress to bar the use in a regulation of a specification or standard if it could fairly be said that no practicable alternative to its use existed for securing effective price control. Under the construction urged by the complainants, however, the Taft Amendment would have the effect prior to a determination by the Administrator of invalidating an existing regulation which employed specifications or standards not theretofore used or required even though it might be perfectly clear that the regulation was within the intent of the exception to the Taft Amendment's ban because no other possible alternative for securing effective price control existed.

Such a capricious result demonstrates that the construction contended for by the complainants is unsound. It would impute to Congress the intention, in the face of the menace of inflation which confronted the country in the summer of 1943, of creating a breach in the dyke protecting the nation's price structure by an immediate wholesale invalidation of all existing regulations which employed specifications or standards not previously used or required. The result would have been that a large segment of the nation's economy would have been left wholly at the mercy of inflationary pressures during the period of time required by the Administrator to review the regulations and the situation of each industry concerned and to ascertain in each case whether any practicable alternatives for securing effective price control existed. In the light of the Congressional direction to stabilize prices which had been given to the President by the Stabilization Act passed only nine months previously and in view of the grave danger of inflation which confronted the country when the Taft Amendment was passed such an intention on the part of Congress is unthinkable.

It may be urged that Congress intended the Administrator immediately after the enactment of the Taft Amendment to make a determination under Section 2(j)(3) with respect to each existing regulation containing specifications or standards. The Taft Amendment does not in terms so require, however, and in view of the complexities of the problem, involving many industries, such an immediate determination was clearly impossible. Time was obviously required for investigation and consideration. Unquestionably the Administrator acted with reasonable promptness in making his determination as to MPR 30 in less than two months after the Taft Amendment became law. We think that the Taft Amendment required no more of him than this. Our conclusion is that Section 1347.14(d) of MPR 30 was not invalid between July 16, 1943 and September 11, 1943 by reason of its use of a specification or standard.

The complainants urge that the conclusion thus reached is unfair to them because they were left in doubt as to the validity of the regulation during the interim between the passage of the Taft Amendment and the Administrator's determination. But the Taft Amendment did not render the regulation invalid on its face. United States v. Pepper Bros., 142 F. 2d 340 (C. C. A. 3, 1944). Its validity de-

pended upon whether it could reasonably be said that the [fol. 53] use of the specification or standard was the only practicable method for securing effective price control of unsorted wastepaper. The complainants, as active members of the wastepaper industry, were in a position to know whether this was so and, therefore, to form an intelligent judgment as to the effect of the Taft Amendment upon the regulation. Moreover if they were in doubt during that time it was open to them by protest to question the validity of the regulation and to secure a determination of that question. This they did not do. On the contrary they proceeded to violate the regulation without taking the steps which were open to them to test its continued validity. Under these circumstances they can hardly assert that they were denied due process by the failure of the Administrator to make his determination before they violated the regulation. Compare Yakus v. United States, 321 U. S. 414, 447 (1944).

A judgment will be entered dismissing the complaint.

Dissenting Opinion

Lindley, Judge, dissenting:

I am sorry that I cannot agree with the majority opinion.

If the legislature delegates to an executive or administrative body authority to promulgate regulations or enter orders, provided a certain administrative finding or determination of existence of certain facts be made, the delegated authority fails in the absence of the requisite finding or determination. Mr. Chief Justice Hughes' announcement in Panama Refining Co. v. Ryan, 293 U. S. 409 at 432, is pertinent: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." And Mr. Justice Brandeis, in United States v. B. & O. R. Co., 293 U. S. 454, in discussing certain authority of the Interstate Commerce Commission, made similar comment, saying: "The Act * * * conferred authority, (on the Commission), to prescribe by rule, specific devices, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb': * * * its

finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, * * * the order may be set aside unless it appears that the basic finding was made. * * * complete absence of the basic or essential findings required to support the Commission's order renders it void." See also Wichita Railroad & Light Company v. Public Utilities Commission of the State of Kansas, et al., 260 U. S. 48, and Mahler et al. v. Eby Inspector in Charge Immigration Service, etc., 264 U. S. 32. In the latter case the court commented concerning a warrant of the Secretary of Labor that, inasmuch as it lacked the finding required by the Statute, it was invalid; that the defect went "to the existence of the power on which the proceeding rests."

That the Congress intended by the amendment that no regulation, new or already existing, standardizing commodities should have validity until the requisite determina-
[fol. 54] tion had been made seems obvious from the statement of the managers on the part of the House of Representatives in the Conference Report accompanying H. J. Res. 147 on July 8, 1943 (H. Rep. No. 697, 78th Cong. 1st Sess., p. 3) as follows: "The third clause requires that before any commodity may be standardized the Administrator must determine that no practicable alternative method exists for securing effective price control of the commodity." The Administrator himself said in his statement of reasons involved in the issuance of Supplementary Order No. 64: "The Clause recognizes the Administrator's authority to establish standards whenever he determines 'that no practicable alternative exists for securing effective price control with respect to' a commodity"; and, "Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 unless he can bring his action within the exception to clause 3 by making a determination that no practicable alternative to standardization exists for securing effective price control." He described such action as a condition with which he was required to comply before effectuating standardization.

But the Administrator now takes the position that the unamended regulation possesses all the support necessary to a suit for triple damages or prosecution for criminal

liability. He seems to admit impliedly at least, that upon denial of a protest this court would have to make a judicial determination of invalidity. This is little short of complete confession by respondent of the propriety of the complaint. If an existing regulation is defective because of failure to make a finding and if such defect establishes invalidity in this court when the regulation is attacked here in a protest proceeding, I know of no reason why it should not likewise be held invalid under Section 204(e)(1). I can conceive of no justification for not declaring invalidity as of the time of the effectiveness of the amendment, lasting until the determination was made. Otherwise the Administrator might proceed to enforce the regulation in its original form, without making the determination required by the legislature. In such case Congress's mandate would become entirely meaningless.

I think this reasoning should apply to existing regulations reflecting absence of the essential finding. The amendment having been enacted in an expressed desire to meet the objection that the Price Administrator had exceeded the limitations expressed in section 2(h) of that Act in issuing certain regulations already promulgated, it would seem clear that Congress thought that previous to the amendment the Administrator had been going too far, and ordered him to desist unless and until he made a certain determination.

From and after the effective date of the amendment, complainants, as well as others in the industry, had no foreknowledge of what the Administrator might determine in this crucial respect, or indeed, whether he would ever make any determination of any character; yet the majority would require them to divine what the Administrator would do, and, if they did not foresee what was going to happen, to act at their peril with danger of subjecting themselves to criminal prosecution and a penalty of treble damages. This, I think, far beyond the intent of Congress; nor does it comport with my conception of due process of law.

[fol. 55] To illustrate the extremes to which the majority opinion would carry us, let us assume that the Administrator had not made the essential determination for a year after the Congress enacted the requirement for a determination and yet had prosecuted complainants within that period for violation of the unamended regulation. Then, under the reasoning of my brethren they could be convicted and sen-

tenced and execution of the sentence satisfied, all before the Administrator made the determination which Congress had mandatorily made essential to validity of the regulation. And if the regulation were valid for two months or three months or a year or two years without any determination it might just as logically always be valid. Under this reasoning, respondent need never make a determination, though Congress has directed him to do so.

Apparently the Administrator himself recognized the defect in his regulation resulting from the amendment and realized that he was required to make a determination, for he did so some two months after the amendment became law. But under the majority's view he need never do so. Congress accomplished nothing by the amendment, if after its passage, a regulation could be enforced without compliance with the law.

Under U. S. v. Pepper Bros., 142 F. 2d. 340 (CCA 3), a regulation may be enforced until it is declared invalid by this court. That necessarily follows from the action of Congress withholding from the enforcement courts power to pass upon validity and vesting in this court sole jurisdiction to decide invalidity. But it does not follow that when proper application is made to this court, we should refuse to declare a regulation which fails to comply with the law, invalid as of the date of the amendment.

Even though the regulation remained valid for enforcement purposes in the district court, in view of that court's *lack of jurisdiction to pass upon validity*, it seems to me that when complainants pursue the remedy which Congress has provided, it is our duty to enforce the legislative intent by declaring the regulation invalid, such invalidity reverting back to the time of the effective date of the amendment.

I would deny the motion to dismiss.

[fol. 66] [Stamp:] United States Emergency Court of Appeals. Filed Oct. 5, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J. and Lindley and Laws, JJ.

JUDGMENT

This case came on to be heard on the complaint, Respondent's motion to dismiss the complaint and memorandum in support thereof, and Complainants' objections to motion to dismiss the complaint and memorandum in support thereof, and was argued by counsel.

Upon consideration whereof it is ordered and adjudged that the complaint herein be, and it hereby is, dismissed.

It is further ordered that the clerk of this court transmit forthwith certified copies of this judgment to the Price Administrator and to the United States District Court for the Northern District of Illinois.

Dated October 5, 1945.

By the division.

Teste: Herman C. Beasley, Clerk.

[fol. 67] UNITED STATES EMERGENCY COURT OF APPEALS

I, Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed, mimeographed, and typewritten pages, numbered from 1 to 66, both inclusive, constitute a true copy of

(1) Complaint.

(2) Respondent's motion to dismiss Complaint and memorandum in support thereof.

(3) Proceedings in the United States Emergency Court of Appeals in the case of: No. 232, Thomas Paper Stock

Company, et al., v. Chester Bowles, Price Administrator, as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this 12th day of October, A. D. 1945.

Herman C. Beasley, Clerk, United States Emergency Court of Appeals, By: J. Frederick Mattingley, Chief Deputy Clerk. (Seal.)

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1946

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office Supreme Court, U. S.
NOV 3 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 578

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

and

BRIEF FOR PETITIONERS

CLAUDE A. ROTH,
Attorney for Petitioners.

CUMMINGS AND STANLEY,
JACK H. OPPENHEIM,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

THOMAS PAPER STOCK COMPANY, ET AL.,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, petition this Court for a writ of certiorari to review a judgment of the United States Emergency Court of Appeals dismissing petitioners' complaint there; and in support of this petition respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a companion case to *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831 (E.C.A.), in which certiorari was granted on June 4, 1945, and which is pending at the present term as No. 67. A writ of certiorari in the present case and its consolidation with No. 67 are sought for the reasons hereinafter stated.

In No. 67, the court below refused to accord petitioners a review under §204(a) of the Emergency Price Control Act of the Administrator's denial of a protest under §203(a) of the Act, the protest having been filed prior to the incorporation of §204(e)(1) into the Act.

The protest asserted that §1347.14(d) of Maximum Price Regulation No. 30 constituted an invalid standardization of unsorted wastepaper from July 16, 1943, the date of the enactment of §2(j) of the Act (known as the Taft Amendment) until September 11, 1943, the date on which the Price Administrator made the determination required by §2(j)(3) of the Act as a condition precedent to the standardization effected by §1347.14(d) of the Regulation.

Petitioners are under indictment, and they have been sued for treble damages, on account of sales of unsorted waste paper made between July 16 and September 11, 1943, allegedly in violation of the protested provision of the Regulation (R. 4-5).

In the decision under review in No. 67, it was suggested that petitioners might apply to the District Court having jurisdiction of the criminal case involving the pro-

tested Regulation for leave to file a complaint in the Emergency Court of Appeals under §204(e)(1) of the Act, presenting the same objection to the validity of the Regulation during the period of July 16 to September 11, 1943, as that presented in the protest. The court below said, 148 F. 2d at page 842:

> We may consider that objection upon its merits only if and when a complaint asserting it is filed under Section 204(e)(1) with leave of the United States District Court for the Northern District of Illinois after the complainants satisfy that court that the objection is asserted in good faith and that there is reasonable and substantial excuse for the complainants' failure to present it in a protest filed before September 11, 1943. In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944 *it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.* (Emphasis added.)

In view of the foregoing suggestion, an application for leave to file a complaint under §204(e)(1) was made by petitioners (R. 7), but it was not acted upon immediately by the District Court. The petition for certiorari in No. 67 was then filed. Subsequently the District Court granted the leave applied for (R. 9); and this Court (after being informed of the District Court's action) granted the petition for certiorari. (See chronological statement in Appendix II of Brief for Petitioners in No. 67, pp. 22-27.)

The District Court, in its order granting leave to file the complaint under §204(e)(1), followed the lead of the Emergency Court's opinion by finding that the objections to the validity of the Regulation were made in good faith, and that there was reasonable and substantial excuse for defendants' failure to present such objections in a protest

filed in accordance with §203(a) of the Emergency Price Control Act" (R. 14)—a finding which has meaning only in relation to the construction of §203(a) adopted by the Emergency Court in the decision under review in No. 67, since it has always been petitioners' contention, as argued in No. 67, that they *had* presented their objections in a protest filed in accordance with §203(a).

The present case was, upon the basis of said finding and in line with the Emergency Court's suggestion, initiated by a Complaint (R. 1) filed under §204(e)(1); and, like the protest originally filed under §203(a), it attacked §1347.14(d) of Maximum Price Regulation No. 30 as having been invalid from July 16 to September 11, 1943.

The Decision in the Present Case

The Government moved to dismiss the complaint upon the merits (R. 16). The motion was sustained, and the court below in its decision (R. 50-53) passed upon the merits of the question which it had declined to consider in 148 F. 2d 831. It held that §1347.14(d) of Maximum Price Regulation No. 30 was valid during the period July 16 to September 11, 1943, *regardless of the fact that during the period in question the Administrator had not made the express determination required by the Congress in §2(j)(3) of the Act as a condition precedent to the standardization effected by the provision in question.* Judge Lindley dissented, stating that to subject a person to criminal and civil penalties during a period when the Regulation did not meet the express requirements of the Act did not comport with his conception of due process of law. Judge Lindley, as will appear from his dissenting opinion, relies upon decisions of this Court holding that if a citizen is to suffer a penalty for the violation of a legislative or-

der or regulation of an executive officer, *due process of law* requires that it shall appear that the order or regulation is within the authority of the officer to promulgate and, if that authority depends upon determinations of fact, those determinations must be affirmatively shown. He considers the history of the legislation in question and concludes that the Congress intended by the Taft Amendment that no regulation, new or *existing*, standardizing commodities should have *validity* until the requisite determination had been made by the Administrator. A fuller statement of the particular question involved in the present case is set forth below under the caption, *The Substantive Issue.*

With reference to the question of due process, it was said in the majority opinion that because petitioners had not filed a protest under §203(a) "during the time it was open to them by protest to question the validity of the regulation"; they could not assert "that they were denied due process by the failure of the Administrator to make his determination before they violated the regulation"—completely forgetting what the court itself had emphasized in its earlier decision: *the good faith of petitioners' objections to the Regulation and the justifiable delay in not filing a protest during the period of the Regulation's claimed invalidity, i. e., between July 16 and September 11, 1943.* It is petitioners' contention, moreover, that they had filed a timely protest under §203(a); and this phase of the matter is under review in No. 67.

The decision in the case at bar is thus made to turn not simply upon the *merits* of the objection to §1347.14(d) of the Regulation, but equally upon the question of the *timeliness* of that objection—and the latter question will not be resolved until this Court's disposition of No. 67, in which it presents the principal issue.

The two cases have thus become inextricably linked. Moreover, the reasoning in the two is contradictory. As will become evident upon analysis, the conclusion of the majority opinion under review in No. 67—i.e., that petitioners could obtain the same relief under §204(e)(1) as under §203(a), has been effectually undermined by the conclusion implicit in the present decision—i.e., that a complaint under §204(e)(1) is not as meritorious as a protest under §203(a).

A further complicating factor is that Judge Laws dissented in the first case and Judge Lindley in the second, *the respective dissents each asserting that petitioners have been deprived of due process of law.*

The Substantive Issue

The substantive issue in the case at bar, dissociated from the complexities injected by the Emergency Court's contradictory pronouncements with respect to the procedural issue already under review in No. 67, may be stated as follows:

Section 1347.14(d) of the Regulation fixes the maximum price for *all types* of unsorted wastepaper *regardless of grade* in terms of a specification or standard, "No. 1 mixed paper" (R. 2).

Prior to the Regulation, the specification or standard in question was not in general use in the wastepaper industry, and it had not previously been promulgated by another Government agency. The price of unsorted wastepaper had always varied in relation to the materials contained in a particular lot, each lot being of a different value from every other lot (R. 2).

Complainants' business consists in large part in dealing in printers' unsorted wastepaper, which is made up of

clippings of new paper from printers' cutting machines, and consists of unbleached and bleached sulphite and soda pulp, which, by reason of its high quality, is manufactured into book and bond paper. This type of unsorted wastepaper has always been distinguished from a lower grade of unsorted wastepaper obtained from office buildings, department stores, etc., which is used to manufacture box board and paper board (R. 3).

The Price Administrator was prohibited by 2(j) of the Emergency Price Control Act, known as the Taft Amendment, enacted on July 16, 1943, from promulgating §1347.14(d) of the Regulation, which had the effect of establishing a single maximum price for all types of unsorted wastepaper regardless of grade, without first making the determination expressly required by 2(j)(3) that no practicable alternative exists for securing effective price control. The Price Administrator did not make such a determination until September 11, 1943, when he issued Supplementary Order No. 64 (8 F. R. 12554) by which he amended the preamble to Maximum Price Regulation No. 30 by adding thereto the following sentence:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

It was explicitly provided in Supplementary Order No. 64 that it "shall become effective September 11, 1943". It is evident from the use of the present tense in the determination "that no practicable alternative *exists*", as

well as from the express provision making the determination effective on September 11, 1943 (the same day it was issued) that the determination related only to the situation as it existed on September 11, 1943—the order being silent as to whether there existed any practicable alternative prior to that date.

It is petitioners' contention that because the express determination required by statute was not made until September 11, 1943, and because the determination itself, when made, spoke only as of the latter date, there was no lawful basis, after the enactment of the Taft Amendment and until September 11, 1943, for the standardization effected by §1347.14(d) of the Regulation.

The arguments supporting petitioners' contention are more fully set forth in the annexed Brief, *infra*, pp. 14-24.

The majority opinion of the court below completely begs the real question. The opinion makes two erroneous assumptions: (1) that the record discloses that there was no practicable alternative for the standardization during the period from the issuance of the Regulation until September 11, 1943—whereas, as we have shown, the record is wholly silent as to that; and (2) that the Regulation's validity "depended upon whether it could reasonably be said that the use of the specification or standard was the only practicable method for securing effective price control of unsorted wastepaper"—whereas the validity actually depended upon an administrative determination made pursuant to the requirements of the statute.

It was said in the dissenting opinion of Judge Lindley: "I can conceive of no justification for not declaring invalidity as of the time of the effectiveness of the (Taft) amendment, lasting until the determination was made.

Otherwise the Administrator might proceed to enforce the regulation in its original form, without making the determination required by the legislature. In such case Congress's mandate would become entirely meaningless." Judge Lindley added that the result reached by the majority opinion did not comport with his conception of due process of law.

A more complete analysis of the case is submitted in the annexed Brief.

II.

BASIS OF JURISDICTION.

The judgment of the Emergency Court of Appeals sought to be reviewed was entered on October 5, 1945. The jurisdiction of this Court is invoked under §204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U.S.C. App. Supp. IV, Sec. 901, as amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess. (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U.S.C. Sec. 347).

III.

SPECIFICATION OF ERRORS TO BE URGED.

The Emergency Court of Appeals erred in the following respects:

1. In holding that §1347.14(d) of Maximum Price Regulation No. 30 was not invalid between July 16 and September 11, 1943.

2. In holding that notwithstanding the enactment of the Taft Amendment on July 16, 1943, a then extant price regulation employing a standard which was not previously in general use in the industry and which had not been promulgated by another Government agency, is to be deemed valid despite the failure of the Price Administrator to make the determination required by the Taft Amendment that there was no practicable alternative to effective price control.

3. In holding that the validity of the Regulation between July 16 and September 11, 1943, "depended upon whether it could reasonably be said that the use of the specification or standard was the only practicable method for securing effective price control of unsorted wastepaper", regardless of the absence of an administrative determination of that fact pursuant to the requirements of §2(j)(3) of the Act.

4. In holding that the record discloses that there was no practicable alternative for securing effective price control from the time of the issuance of the Regulation until September 11, 1943.

5. In holding that petitioners cannot assert deprivation of due process, because their protest was not filed until after September 11, 1943.

6. In holding that petitioners "proceeded to violate the Regulation without taking the steps which were open to them to protest its continued validity".

IV.

QUESTIONS PRESENTED.

1. Whether by reason of the enactment of §2(j) of the Emergency Price Control Act on July 16, 1943, an existing regulation not then satisfying the conditions imposed by §2(j), shall, on a complaint properly filed under §204(e)(1), be adjudged invalid from July 16, 1943, until the date on which the requirements of §2(j) were met, September 11, 1943.

2. Whether a complaint properly filed under §204(e)(1) of the Act, seeking such a judgment of invalidity, may be dismissed as not entitled to raise the same questions of due process as a protest filed under §203(a).

3. Whether a finding made by the District Court under §204(e)(1) of the Act that there was reasonable and substantial excuse for petitioners' not having filed a protest before September 11, 1943, (which finding was, in advance of its entry by the District Court, approved by the Emergency Court of Appeals in 148 F. 2d at p. 842) precludes the Emergency Court of Appeals from subsequently holding that petitioners were delinquent and that they therefore cannot assert deprivation of due process.

4. Whether the construction of the Act by the court below, requiring petitioners to have foreseen on July 16, 1943, that at some unknown time in the future the Administrator would make a determination under clause (3) of §2(j) of the Act, and also requiring petitioners to have foreseen the nature of such determination, has deprived petitioners of due process of law.

5. Whether the construction of the Act by the court below, as permitting a person to be indicted for alleged

violations of a regulation occurring before the regulation was amended to satisfy the requirements of §2(j) of the Act, violates the constitutional prohibition against *ex post facto* laws.

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The majority opinion of the court below construes §2(j)(3) of the Emergency Price Control Act in a way which deprives petitioners of due process of law and conflicts with the applicable decisions of this Court on the question of due process. The dissenting opinion of Judge Lindley points out that the decision conflicts with the pronouncements of this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *United States* v. *B. & O. R. Co.*, 293 U. S. 454; *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48; and *Mahler, et al.* v. *Eby Inspector in Charge Immigration Service, etc.*, 264 U. S. 32.

There is another important reason for the allowance of the writ:

A decision of the Emergency Court of Appeals in a companion case, *Thomas Paper Stock Company* v. *Bowles*, 148 F. 2d 831, is under review by this Court in No. 67 at the present term. That case involves the construction of procedural provisions contained in §§203 and 204 of the Emergency Price Control Act, affecting the constitutional rights of all who are subject to price regulations. The present case arose directly out of the decision in the first case. In fact, it was initiated on the explicit suggestion

of the Emergency Court in 148 F. 2d at p. 842. Yet the result reached in the present case turns in part upon a wholly contradictory construction by the same court of the same procedural provisions. Therefore considerations affecting the outcome of No. 67 are inherent in the present case, and vice versa. Certain of the issues concerning due process in both cases can only be resolved by their consolidation.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Emergency Court of Appeals, to the end that this cause may be consolidated for hearing with No. 67 at the present term, and that both causes may be reviewed and determined by this Court as provided by the statutes of the United States; and that said judgment of the United States Emergency Court of Appeals may be reversed; and that such other relief may be granted as to this Court may seem proper.

November 3, 1945.

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinion Below

The opinion of the Emergency Court of Appeals (R. 50-55) is reported in Pike and Fischer, 3 OPA Opin. & Dec. 1071. It has not yet been reported in the Federal Reporter.

Jurisdiction

A statement of the basis for jurisdiction is set forth in the preceding petition, p. 9.

Questions Presented

These are set forth in the preceding petition, pp. 11-12.

Statutes and Regulations Involved

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in Appendix I, *infra*, pp. 27-33. The maximum price regulation involved and pertinent amendment thereto appear in the Federal Register (7 F.R. 9732; 8 F.R. 12554). The statement of reasons involved in the issuance of Supplementary Order No. 64 incorporates by reference the same reasons as those in the issuance of Supplementary Order No. 55, the latter statement being set forth in Appendix II, *infra*, pp. 35-42.

Statement of the Case

This will be found in the preceding petition, pp. 2-8.

Specification of Errors

The errors to be urged are specified in the preceding petition, pp. 9-10.

SUMMARY OF ARGUMENT

I

It is conceded by the Government that §1347.14(d) of MPR 30, by establishing a single maximum price for all types of unsorted wastepaper, regardless of grade, in terms of "No. 1 mixed paper", made use of a specification or standard obnoxious to clause (4) of the Taft Amendment, enacted July 16, 1943. From that date until September 11, 1943, the provision in question lacked statutory authority, because not until the latter date did the Administrator determine, pursuant to clause (3) of the Amendment, that no practicable alternative to standardization existed with respect to such commodity. There has never been any administrative determination that no practicable alternative to standardization existed between July 16 and September 11, 1943. Congress intended that the Taft Amendment should apply to regulations existing at the time of its enactment. Therefore the provision in question should, on a complaint properly filed under §204(e)(1) of the Act, be adjudged invalid from July 16 to September 11, 1943.

II.

To subject petitioners to penalties for alleged violations of a regulation, occurring at a time when the regulation was without statutory sanction, is to deprive them of due process of law. Petitioners cannot be denied the right to assert deprivation of due process upon the ground that they should have filed a protest under §203(a) of the Act before September 11, 1943, inasmuch as petitioners did file a timely protest under §203(a) and the only reason

they had to take recourse to §204(e)(1) was because of the construction of §203(a) made by the court below in 148 F. 2d 831, which construction is now under review in No. 67 at the present term. Moreover, the complaint under §204(e)(1) was predicated upon a finding by the District Court that there was reasonable and substantial excuse for petitioners not having filed a protest prior to September 11, 1943. In any event, a complaint under §204(e)(1) is entitled to the same considerations of due process as a protest under §203(a).

ARGUMENT.

I.

SECTION 1347.14(d) OF MAXIMUM PRICE REGULATION NO. 30 SHOULD BE ADJUDGED INVALID FROM JULY 16 TO SEPTEMBER 11, 1943.

A. During that Period it Failed to Meet the Express Requirements of §2(j) of the Act.

Section 1347.14(d) of MPR 30 was issued and in force prior to the passage of §2(j) of the Act (the Taft Amendment) on July 16, 1943. It is conceded by the Government that §1347.14(d), by establishing a single maximum price for all types of unsorted wastepaper, regardless of grade, in terms of "No. 1 mixed paper", made use of a specification or standard obnoxious to clause (4) of the Taft Amendment. This is because the specification or standard was not in general use in the trade or industry affected, and had not previously been promulgated and its use lawfully required by another Government agency.

The provision in question therefore became invalid upon the enactment of the Taft Amendment, in the absence of an express determination by the Administrator under clause (3) of the Amendment, that no practicable alternative to standardization existed for securing effective price control with respect to such commodity.

The validity of the Regulation prior to the passage of the Taft Amendment is not questioned. When it was originally issued, it did not have to meet the conditions imposed by Congress on July 16, 1943. From the time of the passage of the Amendment, however, and continuing until

September 11, 1943, there was wholly absent any statutory authority for the existence of the standardizing provision, since it was not until the latter date that the Administrator made the express determination required by clause (3) of the Amendment.

In making the determination requisite to validity on September 11, 1943, the Administrator spoke only as of that date. His determination was wholly silent as to whether a practicable alternative to standardization existed prior to September 11, 1943. The text of the determination itself explicity stated that it was made effective September 11, 1943, the day on which the determination was made. Therefore, the court below simply begs the question when it lets its decision rest upon the absolutely unfounded assumption that there was no practicable alternative to standardization prior to September 11, 1943; and when, having made that wholly unwarranted assumption, it erroneously goes on to say that the Regulation's validity "depended upon whether it could reasonably be said that the use of the specification or standard was the only practicable method for securing effective price control of unsorted waste-paper". Actually, the Regulation's validity *depended upon an express administrative determination*, as required by §2(j)(3), and not upon "whether it could reasonably be said, etc." The violence done to logical analysis of the issue by constant recurrence of these baseless assumptions, is evident throughout the majority opinion.

It would seem obvious that the Regulation was legally defective between July 16 and September 11, 1943 for the reasons pointed out by Judge Lindley in his dissenting opinion:

> If the legislature delegates to an executive or administrative body authority to promulgate regulations or enter orders, provided a certain administrative finding

or determination of existence of certain facts be made, the delegated authority fails in the absence of the requisite finding or determination. Mr. Chief Justice Hughes' announcement in *Panama Refining Co.* v. *Ryan*, 293 U. S. 409 at 432, is pertinent: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." And Mr. Justice Brandeis, in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, in discussing certain authority of the Interstate Commerce Commission, made similar comment, saying: "The Act * * * conferred authority, (on the Commission), to prescribe by rule, specific devices, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb'; * * * its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review * * * the order may be set aside unless it appears that the basic finding was made. * * * complete absence of the basic or essential findings required to support the Commission's order renders it void." See also *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48 and *Mahler et al.* v. *Eby Inspector in Charge Immigration Service, etc.*, 264 U. S. 32. In the latter case the court commented concerning a warrant of the Secretary of Labor that, inasmuch as it lacked the finding required by the Statute, it was invalid; that the defect went "to the existence of the power on which the proceeding rests,"

B. Congress Intended by Enacting §2(j) that Existing Regulations Should Not Have Validity Unless the Conditions Imposed by that Section Were Met.

The majority opinion says that to impute to Congress the intention of making the Taft Amendment immediately applicable to existing regulations within its purview is "unthinkable," because, it is claimed, the result would have been to disrupt the price control structure.

This interpretation of the situation existing on July 16, 1943 completely ignores the explicit statement of Congressional intention contained in the statement of the Managers on the part of the House in the Conference Report accompanying H. J. Res. 147 (H. Rep. 697, 78th Cong., 1st Sess., p. 3):

> The purpose of this amendment to section 2 of the Emergency Price Control Act of 1942, as amended, is to meet the objection that the Price Administrator has exceeded the limitations expressed in section 2(h) of that act in issuing *certain regulations already promulgated.* (Emphasis added.)

It is apparent from the foregoing that Congress was of the opinion that the Administrator himself had seriously disrupted the type of price control structure intended originally to be restricted by §2(h) of the Act. The views of Judge Lindley on this point as expressed in his dissenting opinion are:

> I can conceive of no justification for not declaring invalidity as of the time of the effectiveness of the amendment, lasting until the determination was made. Otherwise the Administrator might proceed to enforce the regulation in its original form, without making the determination required by the legislature. In such case Congress's mandate would become entirely meaningless.

> I think this reasoning should apply to existing regulations reflecting absence of the essential finding. The amendment having been enacted in an expressed desire to meet the objection that the Price Administrator had exceeded the limitations expressed in section 2(h) of that Act in issuing certain regulations already promulgated, *it would seem clear that Congress thought that previous to the amendment the Administrator had been going too far, and ordered him to desist unless and until he made a certain determination.* (Emphasis added.)

The language in the Conference Report bearing directly upon clause (3) of the Taft Amendment emphasizes that the required administrative determination was intended to be made a *condition precedent*. Thus it is said on p. 3 of the Report:

> The third clause requires that *before* any commodity may be standardized, the Administrator *must determine* that no practicable alternative method exists for securing effective price control of the commodity. (Emphasis added.)

In the concluding paragraph of the same statement it is said that the enactment of the provision in question makes clear "the circumstances under which the Administrator may act."

C. The Administrator Recognized on September 11, 1943, the Actual Intention of Congress.

That the making of the administrative determination is to be deemed a condition precedent to the effectiveness of any attempted standardization was recognized by the Administrator himself on September 11, 1943, in the statement of reasons involved in the issuance of Supplementary Order No. 64 (incorporating by reference the same as those for the issuance of Supplementary Order No. 55. See Ap-

pendix II, *infra*, pp. 35-42). The discussion in the latter document of the legislative history of clause (3) of the Taft Amendment unequivocally asserts that the Administrator has authority to establish standards only when he makes the required determination. Thus it is said in the fifth paragraph of the Administrator's statement:

> The clause recognizes the Administrator's authority to establish standards *whenever he determines* "that no practicable alternative exists for securing effective price control with respect to" a commodity. (Emphasis added.)

Again, in the fourteenth paragraph of the same document, it is recognized that the determination is a condition precedent to standardization:

> Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 *unless he can bring his action within the exception to clause 3 by making a determination* that no practicable alternative to standardization exists for securing effective price control. (Emphasis added.)

Indeed, the fact that the making of a determination is a condition precedent is declared in so many words by the Administrator in the sixteenth paragraph of the same document when he describes the requirement as a "*condition*" which must be "*met*" before effectuating standardization.

On this point Judge Lindley said in his dissenting opinion:

> Apparently the Administrator himself recognized the defect in his regulation resulting from the amendment and realized that he was required to make a determination, for he did so some two months after the amendment became law. But under the majority's view he

need never do so. Congress accomplished nothing by the amendment, if after its passage, a regulation could be enforced without compliance with the law.

II.

PETITIONERS HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW.

The concluding paragraph of the majority opinion deals with petitioners' contention, that to subject them to penalties for alleged violations of a regulation occurring at a time when the regulation was without statutory sanction, is to deprive them of due process of law.

It is true, as the court below says, that under *United States* v. *Pepper Bros.*, 142 F. 2d 340 (C.C.A. 3, 1944), a regulation may be enforced until it is declared invalid by the Emergency Court of Appeals. But in the present case, petitioners have not been convicted of violating the Regulation, and have been granted a stay by the District Court, under §204(e)(1) of the Act, for the purpose of permitting the Emergency Court to pass upon the validity of the Regulation. The present case could not have been initiated except upon the District Court's finding that there was reasonable and substantial excuse for petitioners' not having filed a protest prior to September 11, 1943.

Accordingly, the situation is entirely different than the one in *Yakus* v. *United States*, 321 U. S. 414, 447, which is cited in the majority opinion. In the *Yakus* case the defendants had filed no protest under §203(a), and did not have available to them the remedy provided by §204(e)(1), which was not enacted until later. Petitioners, however, did file a protest under §203(a); and the only reason they had to take recourse to §204(e)(1) was because of the con-

struction of §203(a) made by the court below in 148 F. 2d 831. This construction is now under review in No. 67 at the present term. Under the circumstances it is indeed startling to find the court below denying petitioners the right to assert deprivation of due process on the ground that "they proceeded to violate the regulation without taking the steps which were open to them to protest its continued validity." Judge Lindley concurred in 148 F. 2d at p. 842 because he believed §204(e)(1) afforded petitioners due process. He was constrained to dissent in the present case because the result reached by the majority renders worthless the provisions of §204(e)(1).

The majority opinion paradoxically holds that "time was obviously required for investigation and consideration" by the Administrator as to whether there was a practicable alternative to the standardization otherwise prohibited by §2(j) of the Act, and that consequently the Administrator "acted with reasonable promptness in making his determination as to MPR 30 in less than two months after the Taft Amendment became law", but would require petitioners to have known on July 16, 1943, whether or not there was a practicable alternative and "to form an intelligent judgment as to the effect of the Taft Amendment upon the regulation". The unsoundness of this position is emphasized in Judge Lindley's dissent:

> From and after the effective date of the amendment, complainants, as well as others in the industry, had no fore-knowledge of what the Administrator might determine in this crucial respect, or indeed, whether he would ever make any determination of any character; yet the majority would require them to divine what the Administrator would do, and, if they did not foresee what was going to happen, to act at their peril with danger of subjecting themselves to criminal prosecution and a penalty of treble damages. This, I think,

far beyond the intent of Congress; nor does it comport with my conception of due process of law.

To illustrate the extremes to which the majority opinion would carry us, let us assume that the Administrator had not made the essential determination for a year after the Congress enacted the requirement for a determination and yet had prosecuted complainants within that period for violation of the unamended regulation. Then, under the reasoning of my brethren they could be convicted and sentenced and execution of the sentence satisfied, all before the Administrator made the determination which Congress had mandatorily made essential to validity of the regulation. And if the regulation were valid for two months or three months or a year or two years without any determination it might just as logically always be valid. Under this reasoning, respondent need never make a determination, though Congress has directed him to do so.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the case should be consolidated with No. 67.

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November 3, 1945.

APPENDIX I.

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, are as follows:

SEC. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[3]

* * * * * *

SEC. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206,*[4] any person subject to

[3] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

[4] As amended by sec. 106 of Stablization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.[5] Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[6] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. If the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within

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[5] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[6] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same; and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request

by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this

section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b),

(c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective

in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[7]

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[7]Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

APPENDIX II.

[STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 64]

OFFICE OF PRICE ADMINISTRATION

STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 64

The reasons for the issuance of this supplementary order are the same as those for the issuance of Supplementary Order No. 55 and the latter are incorporated herein by reference.

Issued this 11th day of September 1942.

CHESTER BOWLES,
Acting Administrator.

[STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 55]

OFFICE OF PRICE ADMINISTRATION

Statement of the Reasons Involved in the Issuance of Supplementary Order No. 55 Amendment of Preamble of Certain Maximum Price Regulations Covering Grocery Products and Tobacco with Respect to Use of Specifications or Standards.

The Taft Amendment to the Emergency Price Control Act of 1942 restricts the power of the Administrator to make use of standards in price regulation. The Amendment, contained in House Joint Resolution No. 147 which continued the Commodity Credit Corporation, adds a new paragraph (j) to Section 2 of the Emergency Price Control Act of 1942. The standards provisions are contained

in clauses (3) and (4) of this paragraph which provide as follows:

> "(3) Nothing in this Act [i.e. the EPCA] shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

To determine whether and to what extent the price regulations issued by the Office of Price Administration conform to the "standards" requirement of the Taft Amendment, the Administrator has caused every price regulation to be carefully scrutinized. Supplementary Order No. 55, which this Statement accompanies, amends the preamble of the price regulations covering grocery products and tobacco E. H. P. by adding appropriate findings of compliance with the Amendment, wherever this may be done. Similar orders are being issued with respect to other price regulations issued by the Office of Price Administration. In addition, a separate supplementary statement of considerations is being issued for each regulation justifying the finding that the regulation complies with the Amendment. Appropriate amendments will be issued to those price regulations in which a finding cannot be made of compliance with the "standards" provisions of the Taft Amendment.

Since doubts have been expressed as to the exact meaning of the "standards" provisions, it is appropriate that the Price Administrator state his views as to their meaning and intent and the basis upon which he has acted in determining whether the price regulations issued by this Office conform to the requirements of the provisions.

> Clause 3 of the Taft Amendment states that "Nothing in this act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine with respect to such standardization, that no praticable alternative exists for securing effective price control with respect to such commodity.

Although as was pointed out by Senator Taft, "the word 'standardization' which went into the amendment was not thought of or debated particularly" (*Cong. Rec.*, July 6, 1943, at p. 7327), it is clear from the legislative history and context of the clause that to "standardize" was considered as meaning, broadly, to establish standards or to require conformity to standards.

Thus, for the purposes of price control, the Administrator "standardizes" a commodity—that is, establishes standards for it—whenever he bases ceiling prices upon standards or specifications which were not previously established either by general industry usage or by the action of another Government agency. The clause recognizes the Administrator's authority to establish standards whenever he determines "that no practicable alternative exists for securing effective price control with respect to" a commodity.

The Administrator, however, does not "standardize" a commodity merely by basing ceiling prices for it upon standards, when the commodity had already been stand-

ardized either by the general and voluntary use of those standards in the industry or by the action of another Government agency requiring their use.

When the Price Administrator requested the relaxation of the prohibition against standardization contained in the War Agencies Appropriation Bill, which unqualifiedly prohibited the Administration from "requiring * * * standardization", he accepted this understanding of "standardize." He did this explicitly by accompanying the proposal that he retain power to standardize when essential to effective price control with a suggested clarifying provision declaring that "no order * * * shall be deemed to require standardization" because it fixes maximum prices for different kinds, classes or types of a commodity described in terms of standards or specifications which were "in substantial use in the * * * industry affected" or were established by another Government agency. For text, see *Cong. Rec.*, July 6, 1943, at p. 7326.

The Administrator's proposal was accepted without change as an amendment to the Commodity Credit Corporation Bill by the Senate Committee on Banking and Currency. Although the committee amendment was subsequently modified on the floor, nothing in the changes which took place, or in the history of the provision either in the Senate or the House, suggests any other understanding of the basic concept of standardization.

> Clause 4 of the provisions states that "Nothing in this Act shall be construed * * * (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards under such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously

been promulgated and their use lawfully required by another Government agency."

This clause had its origin in the provision which the Administrator proposed to amend to the clause (now clause 3) giving him power to standardize where essential for effective price control. The purpose of this provision was to make clear that the action it described—the setting of maximum prices on the basis of standards already established—was *not* standardizatipn. In the form proposed by the Administrator the clause was approved by the Senate Banking and Curency Committee in a report submitted by Senator Wagner (for himself and Senator Taft). *Senate Report, No.* 387, 78th Cong., 1st Sess., July 3, 1943. In this report, the action described in the clause was treated as wholly distinct from standardization. *Id.*, at p. 3.

The form of the clause was changed as a result of an amendment offered from the floor by Senator Taft. He stated that the amendment had the approval of the Administrator and presented it as meeting the objections which the Administrator had raised to the proviso in the Appropriation Act which prohibited outright any order "requiring • • • standardization." The purpose of the amendment seems to have been to prevent the claim that pricing by reference to types of standards, *other than those specified in the clause*, would not be "standardizing" and hence would not be subject to the limitations in clause 3. The change in form resulting in forbidding the Administrator to price by standards, when he had not established the standards in the manner permitted by clause 3, unless the standards were of the particular kinds which clause 4 specifies. Had Senator Taft intended to confine the Administrator's power to make use of standards to commodities already standardized, and thus to deny the Adminis-

trator's own power to standardize, his amendment would have been a reiteration of the proviso and could not possibly have been supposed to satisfy the objections to that proviso which the Administrator had expressed.

In explaining the amendment, Senator Taft said: "The amendment as I now offer it is only slightly different from the committee amendment." *Cong. Rec.*, July 6, 1943, at p. 7327. In addition to the change already noted, the modified amendment tightened the committee amendment in two other respects. It required that industry standards, if they were to be a basis of action under clause 4, should have been in "general", not merely "substantial," use, and that standards promulgated by another Government agency should be standards which the agency had lawfully required to be used. These three changes were not improperly described as "slight". No such description could have been made of a change which deprived the Administrator of any power to establish new standards, however essential to price control, and which, in so doing, invalidated scores of outstanding maximum price regulations.

The statement of the managers on the part of the House pointed out that the Taft Amendment warranted "the repeal of the somewhat broader limitations recently included in the National War Agencies Appropriations Act of 1944, to which the Administrator objected." The characterization of the Taft Amendment as imposing narrower limitations than the appropriation proviso would not be true if clause 4 nullified clause 3.

Some uncertainty has been expressed as to the meaning of the Taft Amendment because of two statements which appear in the managers' statement:

1. In describing the effect of clause 4, the managers state: "But requirements that standards or specifications

may be used in manufacturing or selling, or that such standards appear on the invoice, are prohibited" except where the standards meet the conditions specified in clause 4. Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 unless he can bring his action within the exception to clause 3 by making a determination that no practicable alternative to standardization exists for securing effective price control.

2. The managers also state: "Each of these four limitations [the four clauses] is made separately applicable to the issuance of maximum price regulations." The purpose of this observation seems to have been to reassure those who, like Senator Vandenberg (See *Cong. Rec.*, July 6, 1943, at p. 7327), feared that the Administrator might attempt to exercise his power to standardize so as to impair trade and brand names or to reintroduce grade labeling. The statement indicates that compliance with the exception in clause 3 will not justify action in violation of clause 1 or 2 which relate to trade and brand names and grade labeling. It does not indicate that clause 4 defeats clause 3. Clause 1 had its origin in a purpose to indicate actions which *were not subject* to clause 3, and the distinction between the actions subject to each clause was consistently maintained during the bill's history. It cannot be said that clause 4 governs actions which *are subject* to clause 3 and so limits them as in effect to nullify the power to standardize which the exception in clause 3 permits.

As a result of this analysis of the language of the Taft Amendment and its legislative history, the Administrator has reached the conclusion that he may properly issue price regulations in which prices are based on or calculated by

reference to standards or specifications only if one of the following conditions is met:

1. The standards or specifications were, prior to their use in the regulation, in general use in the industry.

2. The use of the standards or specifications was, prior to their use in the regulation, lawfully required by another Government agency.

3. The Administrator has determined that no practicable alternative to using the standards or specifications exists for securing effective price control.

This conclusion accords with the President's understanding of the meaning of the Taft Amendment, as stated by the President when he signed the Commodity Credit Corporation bill. The President stated that a construction which would prohibit "the Administration from making use of standards in any case regardless of how essential they were to price control unless such standards had been previously established by industry acceptance or trade acceptance" would "cripple price control". The President declared that he signed the bill with the understanding that the Taft Amendment "preserved power in the Administrator to 'standardize' a commodity in any case on which this was absolutely essential to an effective system of fixing prices."

Issued this 11th day of September, 1943.

CHESTER BOWLES,
Acting Administrator.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 578

THOMAS PAPER STOCK COMPANY AND ALVIN E. SANDROFF,

Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

REPLY BRIEF FOR PETITIONERS.

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Of Counsel.

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"To state the question often is to decide it. And it may do this by failure to reveal what fully is at stake."[1]

The question presented in this proceeding is not correctly stated in the opinion of the court below. And a rather obvious misstatement of the question is made in the Government's brief here.

The Court Below Begs the Question.

In its statement (R. 45), the court below simply begs the question:

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[1] Mr. Justice Rutledge, dissenting in *Yakus* v. *United States*, 321 U. S. 414, p. 482.

> The narrow question which this case presents is whether a previously valid price regulation *which, because there was no practicable alternative for securing effective price control, used a specification or standard not previously used or required*, was rendered invalid by subsection (j)(3) of Section 2 from the time of the enactment of that subsection until the time when the Administrator determined and recorded the fact that no such alternative to the use of the specification or standard existed. [Emphasis added.]

As thus phrased, the question assumes that when the Price Administrator promulgated MPR 30 on November 21, 1942, he resorted to the use of a specification or standard not previously used or required *because he had then decided* that there was no practicable alternative for securing effective price control. It is erroneously taken for granted in the Emergency Court's statement of the question that the type of determination which the Price Administrator was first placed under mandate to make by the enactment of Section 2(j)(3) of the Act on July 16, 1943, *was for all practical purposes made on November 21, 1942.*

But when the regulation was issued, the Price Administrator was under no mandate to determine, and actually he did not determine, that there was no practicable alternative to standardization for securing effective price control. Until the enactment of Section 2(j)(3), there was no occasion for the Administrator to make such a determination. There is nothing in the record to support the assumption that he did make such a determination on November 21, 1942. At that time the Administrator was authorized to issue a regulation, subject to the limitations expressed in Section 2(h) of the Act,[2] when in his judg-

[2] Section 2(h), prior to its amendment by the Stabilization Extension Act of 1944, read as follows: "2(h) The powers granted

ment its issuance was *necessary* to effectuate the purposes of the Act. Thus, when Maximum Price Regulation No. 30 was issued on November 21, 1942, the Administrator recited by way of preamble:

> In the judgment of the Price Administrator, it is *necessary* and proper to establish maximum prices for sales of wastepaper by a maximum price regulation. [Emphasis added.] (7 F.R. 9732)

The Price Administrator's judgment on November 21, 1942, that it was *necessary* to establish maximum prices for unsorted wastepaper in the manner then established by Maximum Price Regulation No. 30, does not supply the determination later made mandatory by the Taft amendment, that there is *no practicable alternative* to standardization for securing effective price control. On November 21, 1942, alternative methods of properly establishing maximum prices for unsorted wastepaper may have been available. The adoption of one or the other alternative was *necessary*. As long as either method was fair and reasonable, it did not matter which alternative was adopted; and upon the adoption of either one the Administrator could fairly have stated that in his judgment the establishment of maximum prices in the manner then set forth in the regulation was necessary, *regardless of whether another method of control offered a practicable alternative.*

By begging the real question, the court below has robbed the issue of its substance. We submit that the matter at stake is not thus to be carelessly brushed aside.

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in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

The Government Misstates the Question.

In the Government's brief, the question for decision is rather obviously distorted (Br.-p. 10):

> In this proceeding the question is whether Section 1347.14(d) of Maximum Price Regulation No. 30 must be declared to have been invalid between July 16, 1943, when Section 2(j) was added to the Act, and September 11, 1943, when the Price Administrator *publicly announced* his determination that there was no practicable alternative to the standardization embodied in the regulation for effective price control. [Emphasis added.]

The question here presented is *not* whether a *public announcement* of the determination required by Section 2(j)(3) is made a condition precedent to standardization. The precise question is whether Section 2(j)(3) does not make it a condition precedent to the validity of a standardization order that the required determination *be in fact made* prior to the issuance of the order. Petitioners do not complain of the failure to make a "publicly announced" determination. They simply say that *no statutory determination at all was made* prior to September 11, 1943; and that when the determination *was* made on September 11, 1943, it spoke only as of that date.

The Government obviously has strained to state the question for decision in such a form as to avoid the real issue, and this stratagem serves to befog its position with respect to the basic facts. It is not clear from the Government's brief whether its position is (1) that the Administrator *had in fact made* the required determination prior to September 11, 1943, or (2) that the Administrator *could have made* the required determination prior to that date but actually did not do so until September 11. Nor is it clear, with respect to these alternative contentions,

precisely when, prior to September 11, 1943, the determination (1) was made, or (2) could have been made.

Thus it is said, on the one hand, that on September 11, 1943, the Administrator "publicly announced his determination" (Br. p. 11)—the implication being that the determination had in fact been made some time prior to the public announcement. On the other hand, it is said that the statement by the Administrator on September 11, 1943 "shows plainly that his determination was based upon conditions which had existed in the industry for some time" (Br. p. 20)—the implication being that the actual determination was made on September 11, 1943.

We submit that there is no basis whatsoever in the record to support the proposition that the required determination was actually made prior to September 11, 1943. And it is of no consequence whether the determination, when actually made, was based upon conditions which had existed for some time. It is not the existence of conditions *permitting* the making of a determination which controls, but the actual *making* of the determination. Judge Lindley points out in his dissent (R. 49):

> From and after the effective date of the amendment, complainants, as well as others in the industry, had no foreknowledge of what the Administrator might determine in this crucial respect, or indeed, whether he would ever make any determination of any character; yet the majority would require them to divine what the Administrator would do, and, if they did not foresee what was going to happen, to act at their peril with danger of subjecting themselves to criminal prosecution and a penalty of treble damages. This, I think, far beyond the intent of Congress; nor does it comport with my conception of due process of law.

A "Determination" Made in a Protest Proceeding Does Not Meet the Statutory Requirement.

The Government's position with respect to the *time* of the making of the Price Administrator's determination, is further confused by arguments concerning the sufficiency of findings made in administrative hearings pursuant to a protest. It seems to be the Government's position that it is immaterial whether the determination required by Section 2(j)(3) is made *after* the issuance of a standardization order, so long as a "final determination" is eventually made upon the disposition of a protest attacking the validity of the standardization order. This contention of the Government was made explicit in its memorandum in support of the motion to dismiss petitioners' complaint in the Emergency Court of Appeals. In its memorandum, the Government said (R. 15):

> In this context, the protest proceeding would obviously be the place where the standardization provisions of a regulation would be challenged and it would be in such a proceeding that the Administrator, on the basis of the record, would make a *final determination* as to whether or not the standardization provisions under attack came within the purview of clause 3 or clause 4 of the Taft Amendment. [Emphasis added.]

The same contention is advanced in the Government's brief here (p. 17), albeit in a rather attenuated form:

> Under the Emergency Price Control Act, which provides for administrative hearings after issuance of a regulation, pursuant to a protest, a finding such as has now been made to support the regulation is sufficient; for, as pointed out by the Emergency Court of Appeals, the purpose of the statutory protest proceeding to build a record for judicial review has been met. Cf. *Bowles* v. *Willingham*, 321 U. S. 503, 515-516.

What the Government is saying, apparently, is that the determination actually made by the Administrator on September 11, 1943, was gratuitous—that even if he had not made it then, he was still in a position to make it upon the disposition of a protest filed under Section 203 (a), or in proceeding such as this one, under Section 204(e)(1). We submit that it is a gross distortion of the pattern of the Act to say that the requirement of an explicit determination under Section 2(j)(3) may be regarded, as the Administrator contends, "at most as a prerequisite to judicial determination of the validity of a standardization provision" (R. 15). The type of evidence which it is contemplated by the Act will be developed in a protest proceeding—the type of evidence which would give the Administrator an "opportunity to reconsider his action in the light of objections presented"—is clearly irrelevant and immaterial to the question whether the explicit determination required by Section 2(j)(3) has in fact been made prior to the issuance of a standardization order.

The Government's argument in this behalf would only have relevance if the *validity* of the Administrator's determination made on September 11, 1943, were the subject of inquiry in a protest proceeding. In such a case, the question presented would *not* be whether the Administrator *had in fact made* the required determination, but whether the determination was an arbitrary or unreasonable one. Upon judicial review, this Court might recognize that there was some conflict on the question whether there was a practicable alternative to effective price control, yet at the same time find that the Administrator's determination that there was no practicable alternative was not an arbitrary or unreasonable one. The record made in the protest proceeding would then be the basis of the judicial determination of the validity of the stan-

dardization provision. But certainly the notion cannot be sustained that in a proceeding such as the present one, the very purpose of which is to attack the validity of a standardization provision as of period *prior* to the making of the Administrator's determination, that the Administrator could lift himself by his boot straps and *presently* supply the requisite determination, at the same time giving it retroactive effect.

The Defense of "Invalidity" in a Criminal Case.

The basic unsoundness of the Government's contention that the Administrator can make his "final determination" of compliance with the Taft Amendment in a protest proceeding, is exposed upon closer analysis of the "exclusive jurisdiction" provision of the Act. Certainly a defendant in a criminal case—if he has timely pursued the remedies provided by the Act, for protesting the validity of a regulation—cannot be placed in a worse position respecting his substantive rights than he would be in the absence of the "exclusive jurisdiction" provision of the Act. Such a defendant, in the absence of the "exclusive jurisdiction" provision, could attack the regulation as invalid for want of the determination required by Section 2(j)(3). It would be shocking, indeed, for the Government, during the course of the criminal trial, to attempt to supply the administrative determination which had not been made in advance of the issuance of the regulation under attack. We submit that it is equally shocking to all concepts of due process to say that an *ex post facto* "final determination" in a protest proceeding can supply the basis for a conviction in a criminal case.

The Question of "Judicial Review."

Another aspect of the Government's contentions is presented by its reliance upon cases having to do with judicial

review of administrative findings. The Government would make it appear that the question here concerns the adequacy of findings in a record presented for judicial review, and cites a number of this Court's decisions approving the practice, upon judicial review of administrative orders, of remanding the proceedings to supply needed findings. No such question is presented here. Petitioners do not attack the finding or determination made by the Administrator on September 11, 1943. They do not ask this Court to inquire into the reasonableness or validity of the Administrator's finding or determination made on September 11, 1943. Neither the determination itself is attacked, nor its basis. On the contrary, petitioners concede for the purposes of this case that the determination made on September 11, 1943, was a valid one. This Court is not asked to judicially review the question whether the determination, when made, had an adequate basis in law. Consequently the cases cited in the Government's brief are not in point.

Petitioners simply say that no determination at all, such as is required by Section 2(j)(3), was made prior to September 11, 1943, and that the question whether conditions existed which would have permitted the Administrator to have made the determination before that date is entirely beside the point.

The position taken by the Government amounts in effect to saying that the Administrator may ignore the requirements of the Taft amendment until a protest is filed, and that then, for the first time, he can "declare" or "announce" his determination of compliance with the Taft amendment. Obviously, if no protest were ever filed we would have a situation where, under the Government's view, the Administrator would never be required to make the determination which Section 2(j)(3) expressly re-

quires. This would leave the Administrator in the position of being able to standardize a commodity at will, regardless of whether there was a practicable alternative thereto. The restrictions placed upon him by the Taft amendment would thereby lose all meaning, in that the Congressional intention to prevent disruption of industry practices by standardization, except as a last resort when no alternative to effective price control existed, would be completely nullified. *The statutory injunction to the Administrator to affirmatively make a determination before resorting to standardization would be transformed into a statutory permission to standardize any commodity until such time as a protestant is able to show that there is a practicable alternative to such standardization.* A construction of the Taft amendment which leads to this result cannot be sustained.

The extremes to which this view would carry have been emphasized in the dissenting opinion of Judge Lindley (R. 49):

> To illustrate the extremes to which the majority opinion would carry us, let us assume that the Administrator had not made the essential determination for a year after the Congress enacted the requirement for a determination and yet had prosecuted complainants within that period for violation of the unamended regulation. Then, under the reasoning of my brethren *they could be convicted and sentenced and execution of the sentence satisfied, all before the Administrator made the determination which Congress had mandatorily made essential to validity of the regulation.* And if the regulation were valid for two months or three months or a year or two years without any determination it might just as logically always be vaild. Under this reasoning, respondent need never make a determination, though Congress has directed him to do so. [Emphasis added.]

The Intent of the Congress.

The plain meaning of Section 2(j)(3), that the required determination must be made by the Administrator *before* he standardizes a commodity (see our main brief, pp. 20-22), the Government seeks to negate by reading into Senator Taft's statement on the floor of the Senate the notion that he considered the proposed amendment wholly innocuous (Br. pp. 12-13). That the amendment was not intended to interfere with *proper* and *unobjectionable* regulations then extant is perfectly clear. But it is equally clear that under the tests set up by the Taft amendment, Section 1347.14 (d) of Maximum Price Regulation No. 30 *was then objectionable* because it employed specifications or standards which had not theretofore been in general use in the trade, and had not been promulgated and required by another Government agency;—and in that respect it exceeded the limitations expressed in Section 2 (h) of the Act (see our main brief, p. 20). The provision in question remained objectionable—and by virtue of the enactment of Section 2(j)(3) became invalid—until September 11, 1943, when the objection was obviated and the provision validated by the Administrator's *affirmative determination* that there was no practicable alternative for securing effective price control. Moreover, the quotation from Senator Taft's statement would seem to have no bearing whatsoever upon the question here, since on its face it makes reference only to *grade labeling* and the *elimination of trade names*—which are not embraced within clause (3), but fall within the purview of clauses (1) and (2) of Section 2(j).

The Administrator argues that under our interpretation the Taft amendment would have seriously disrupted the price control structure. It is apparent, however, that the Congress was of the opinion that the Administrator himself had seriously disrupted the kind of price control struc-

ed originally to have been limited by section
Act. The Administrator's reliance upon "the
ion of continuity in price control" simply over
bviously basic intention of continuity of *lawful*
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iderations which led to the statutory requir
express determination outweighed such con
as that a short time might elapse between the
the amendment and the Administrator's actio
e thereof, during which time a limited number
ons were open to attack. The situation is no
an that presented when the Administrator is
the issuance of a new regulation setting up
standards. There is necessarily involved a
me during which the Administrator must exam
e question of practicable alternatives to stand
During that time, and before he makes his
on, the issuance of the regulation is postponed

iatus" in Price Control of Unsorted Wastepaper.

ression is sought to be conveyed that the in
of Section 1347.14 (d) of M. P. R. 30 during the
16 to September 11, 1943, would have created
in price control of unsorted wastepaper. Actu
validation of the standardization provisions of
7.14 (d) would *not* have created any such hiatus.
nce of Section 1347.14 (d), every lot of unsorted
would have to be priced *upon the basis of its*
ents—that is, according to the maximum prices
by M. P. R. 30 *for each grade* in the lot, depend
he amount of each such grade. Section 1347.14
a penalty price upon unsorted wastepaper.
of the grades and amount of each grade con
ny one lot. The invalidation of Section 1347.14

(d) during the period July 16 to September 14, 1943, would only have *eliminated the penalty—it would not have eliminated price control.*

Clauses (3) and (4) of Section 2(j) Construed Together.

The construction here contended for by petitioners follows inescapably from the construction placed upon section 2(j) of the Act by the court below in its decision in No. 67. There the court sustained the Administrator's contention that "there is a third situation in which Section 2(j) authorizes him to make use of specifications or standards for the purpose of fixing maximum prices. * * * clauses (3) and (4) of Section 2(j) are to be read together as providing three alternative situations in any one of which he is authorized to employ specifications or standards in connection with price control." [See opinion of court in Transcript of Record in No. 67, pp. 61-65.] We submit that if clauses 3 and 4 are to be read together, and their arrangement in the disjunctive ignored, then the phrase "prior to such order" which appears in clause 4 must be linked, as a matter of logic, to the clause "unless the Administrator shall determine" which appears in clause 3. That is to say, a logical reading of clauses 3 and 4—taken together to express the three situations in which the Administrator may use specifications or standards—would be as follows:

> "Nothing in this Act shall be construed * * * as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, *prior to such order* (1) in general use in the trade or industry affected, or (2) promulgated and their use lawfully required by another Government agency, or (3) determined by the Administrator to be essential because no practicable alternative exists for securing effective price control with respect to such commodity."

The Administrator's express determination that there is no practicable alternative is a made condition, on a par with the other two conditions, under which standardization becomes permissible. Whicheyer of the three conditions is met, it must be capable of objective ascertainment. It is obviously capable of ascertainment whether the standards or specifications have been in general use in the trade or industry affected. It is likewise ascertainable whether they have been promulgated and their use lawfully required by another Government agency. It must by the same token be ascertainable, when neither of the first two conditions is met, that the Administrator *has in fact determined* that no practicable alternative exists, and that such actual determination was made *prior to the issuance of the standardization order.* To say that the Administrator's determination that there is no practicable alternative need not be officially expressed of record prior to the effectiveness of a standardization order, is to destroy the logic of the construction under which clauses 3 and 4 are read together.

Conclusion.

It is respectfully submitted that the judgment of the court below should be reversed and that Section 1347.14(d) of Maximum Price Regulation No. 30 should be adjudged invalid from the date of the enactment of the Taft amendment, July 16, 1943, until the date of the making of the Administrator's determination, September 11, 1943.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 578

THOMAS PAPER STOCK COMPANY AND ALVIN E. SANDROFF, PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 50–55) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on October 5, 1945 (R. 56). The petition for a writ of certiorari was filed on November 3, 1945. The jurisdiction

of this Court is invoked under Section 204 (d) of the Emergency Price Control Act, c. 26, 56 Stat. 23, 50 U. S. C. App. (Supp. III) 924 (d), as amended by Pub. No. 108, 79th Cong., 1st Sess., Sec. 6 (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether, under Section 2 (j) (3), added, on July 16, 1943, to the Emergency Price Control Act of 1942, as amended, an announcement by the Price Administrator that there is no practicable alternative to a standardization for effective price control is a condition precedent to the continued validity, after July 16, 1943, of a previously valid maximum price regulation containing such standardization.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, appear in the Appendix, *infra*, pp. 22–28. Maximum Price Regulation No. 30, and pertinent amendments thereto, appear in the Federal Register (7 F. R. 9732, 8 F. R. 12554).

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30, establishing specific maximum prices for various

grades of wastepaper (7 F. R. 9732). So far as here relevant, the Regulation provided that unsorted wastepaper might not be sold to consumers thereof at a price higher than the maximum price prescribed for No. 1 mixed paper.

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2 (j), the so-called Taft Amendment, which provides that

> Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

For the purpose of this proceeding it is conceded that Maximum Price Regulation No. 30 "stand-

[1] On December 28, 1943, the section involved was amended by Amendment No. 6, 8 F. R. 17483. The amendment made no change relevant to the instant case.

unsorted wastepaper and, therefore, hin the purview of Section 2 (j) (3) of

September 11, 1943, the Administrator l the preamble to Maximum Price Regu- No. 30 by adding the following sentence

nsofar as this regulation uses specifica- ions and standards which were not, prior o such use, in general use in the trade or ndustry affected, or insofar as their use as not lawfully required by another Gov- rnment agency, the Administrator has de- ermined, with respect to such standardiza- ion, that no practicable alternative exists or securing effective price control with espect to the commodities subject to this egulation.

mendment was made by Supplementary No. 64,[2] which was accompanied by a state- the reasons involved in the issuance there- the same time the Administrator issued lementary statement of the considerations l in the issuance of Maximum Price Regu- No. 30.[3]

December 17, 1943, an indictment under 205 (b) of the Act was returned in the States District Court for the Northern

8. 12554.

lementary Order No. 64 and this supplementary of considerations appear at pages 29-37 and 9- tively, of the record in No. 67, this Term.

District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted wastepaper at more than the maximum price prescribed by M. P. R. No. 30 (R. 4–5). On June 29, 1944, a civil action under paragraphs (a) and (e) of Section 205 was brought against petitioners by the Administrator in the same court, alleging similar violations (R. 5).

On June 15, 1944, petitioners filed a protest against Section 1347.14 (d) of the Regulation, pursuant to Section 203 (a) of the Emergency Price Control Act of 1942, as amended. It was contended in the protest that Maximum Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14 (d) of Maximum Price Regulation No. 30 should be declared to have been invalid between July 16, 1943, and September 11, 1943 (R. 8–9).

On June 30, 1944, the Stabilization Extension Act of 1944 (Pub. No. 383, 78th Cong., 2d Sess.), amending the Emergency Price Control Act, became effective. This Act added to Section 204 of the Emergency Price Control Act a new subsection (*e*), *infra*, pp. 25–28, which provides (1) for a limited right of defendants in proceedings under Section 205 to secure review of maximum price or rent regulations through a direct complaint to the Emergency Court of Appeals without prior resort to the administrative protest procedure of Section 203; and (2) for the stay or

dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 9).[1] Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals, pursuant to Section 204 (a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 9). On March 27, 1945, the Emergency Court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204 (a) of the Act to consider the objection that the provision was invalid during the period July 16 to September 11, 1943, by virtue of the Administrator's failure to publish his determination that there was no practicable alternative for securing effective price control (R. 9, 148 F. 2d 831). Petitioners sought review of this decision of the Emergency Court of Appeals and certiorari was granted by this Court on June 4, 1945. No. 67, this Term.

On May 10, 1945, the District Court of the United States for the Northern District of Illinois, Eastern Division, in case No. 43 CR 735, granted the petitioners leave to file with the Emer-

[1] See pages 15-29 of the record in No. 67, this Term.

gency Court of Appeals a direct complaint under Section 204 (e) (1) to challenge the validity of Section 1347.14 (d) of Maximum Price Regulation No. 30 for the period between July 16 and September 11, 1943 (R. 13–15). A complaint under Section 204 (e) of the Act was filed by petitioners on June 8, 1945 (R. 1–5). The Emergency Court of Appeals dismissed the complaint on the merits (R. 56), holding that the enactment of the Taft Amendment on July 16, 1943, did not render Section 1347.14 (d) of Maximum Price Regulation No. 30 invalid between July 16, 1943, and September 11, 1943, when the Administrator announced his determination that there was no practicable alternative for effective price control to the standardization embodied in that section of the Regulation (R. 50–53).

ARGUMENT

1. As succinctly stated by the court below (R. 51):

> The narrow question which this case presents is whether a previously valid price regulation which, because there was no practicable alternative for securing effective price control, used a specification or standard not previously used or required, was rendered invalid by subsection (j) (3) of Section 2 from the time of the enactment of that subsection until the time when the Administrator determined and recorded the fact that no such alternative to the use of

the specification or standard existed. In other words, did the Taft Amendment require a prior determination by the Administrator of that fact in the case of a regulation which had been validly issued before the enactment of the Amendment and did it operate to invalidate the regulation in the interim?

We submit that the court below correctly answered this question in the negative, since it cannot reasonably be said that, in enacting the Taft Amendment, Congress intended to render immediately ineffective an undetermined, but possibly large, number of outstanding, unquestionably valid regulations.[5]

This construction is justified by the language of Section 2 (j) (3) and (4), particularly when that language is compared with the language used by Congress in other statutes,[6] and is not at variance with anything in the legislative history of

[5] The Taft Amendment did not automatically repeal outstanding regulations coming within its terms. *United States v. Pepper Bros.*, 142 F. 2d 340 (C. C. A. 3).

[6] Cf. the National Labor Relations Act, section 10 (c) 49 Stat. 454, 29 U. S. C. 160 (c): "* * * the Board shall state its findings of fact and shall issue * * * an order requiring such person to cease and desist from such unfair labor practice * * *;" the Agricultural Adjustment Act, as amended, section 8c (4), 49 Stat. 754, 7 U. S. C. 608c (4): "* * * the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, * * * that the issuance of such order * * * will tend to effectuate the declared policy of this title with respect to such commodity." See R. 17–18.

the Emergency Price Control Act and the amendments thereto. The Taft Amendment became law at a time when hundreds of maximum price regulations were in effect and the struggle against inflation was in a critical phase. Compare Executive Order 9328, Stabilization of Wages, Prices, and Salaries, April 8, 1943 (8 F. R. 4681). Only the most unequivocal language would justify the conclusion that in passing the Taft Amendment the Congress intended to require the virtual suspension of an indefinite number of maximum price regulations pending their review by the Price Administrator. The unreasonableness of the construction urged by petitioners is further emphasized by the fact that the crux of the pattern of administrative and judicial review established by Sections 203 and 204 of the Act is that an opportunity is given to the Price Administrator to reconsider the validity and reasonableness of his regulations and orders, and make findings thereon, prior to the institution of judicial proceedings. Compare *Yakus* v. *United States*, 321 U. S. 414, 438–439. In such a context it would be most unreasonable to strain the language of Section 2 (j) (3) into a requirement than an outstanding regulation which standardized a commodity was rendered inoperative until the Administrator announced his determination that such standardization was essential to effective price control.

The immediate effect of the Taft Amendment on regulations outstanding at the time of its pas-

sage was to render them subject, by way of protest, to specific new objections. Upon the passage of the Taft Amendment, persons could file protests against maximum price regulations to which they were subject on the assertion and showing that the regulations incorporate standards or specifications which were not in general use in the trade or industry prior to price control and which had not been promulgated and their use lawfully required by another governmental agency, and that it could not reasonably be said that there is no practicable alternative for effective price control to the standardization involved. Petitioners have at no time contended or sought to show that there is, or that between July 16, and September 11, 1943, there was, any practicable alternative to the standardization incorporated in Section 1347.14 (d) of Maximum Price Regulation No. 30.

The closest approach which petitioners have at any time made toward raising any question as to the existence or non-existence of a "practicable alternative" between July 16 and September 11, 1943, is their reference in the petition for certiorari to the Emergency Court of Appeals' "absolutely unfounded assumption that there was no practicable alternative to standardization prior to September 11, 1943" (P. 18, cf. pp. 8, 10). This argument, however, begs the question, since it proceeds on the erroneous assumption that the record must contain support for a factual finding

involved in the Administrator's action when that finding has not been attacked.

It may be observed, however, that the record is not devoid of support for this determination. The Supplementary Statement of Considerations Involved in the Issuance of Maximum Price Regulation No. 30 clearly shows that the conditions requiring the standardization were inherent in the operations of the industry and were constant, having presented an administrative difficulty at all times since the inception of price control. The same Statement of Considerations, issued on September 11, 1943, recited that:[1]

> Both consumers and dealers are in agreement that it is necessary to provide this penalty price upon sales of unsorted paper to consumers.

The Administrator's reference to the expression of opinion by consumers and dealers, necessarily given prior to the issuance of this Supplementary Statement of Considerations, manifestly demonstrates that the determination announced on September 11, 1943, applied to the preceding period. The fact that Supplementary Order No. 64 recites that it "shall become effective September 11, 1943" does not, as contended by petitioners (Pet. 7), indicate that the determination dates

[1] This Supplementary Statement of Considerations is reprinted in full in the record of No. 67, this Term, pp. 9–11. The paragraph specifically directed to Section 1347.14 (d) appears at pp. 10–11.

only from September 11, 1943. All that the effective date of the Supplementary Order means is that as of that date the text of regulations listed in the Supplementary Order is amended by the addition of specified language.

2. In an attempt to show that this case is of greater consequence than the Emergency Court's formulation of the question presented would indicate, petitioners have sought to inject into the case an issue of constitutional validity. They contend, in effect, that procedural due process is lacking unless the statute is construed to prohibit standardization by a regulation during any period prior to the Administrator's announcement that there is no practicable alternative for effective price control. The cases referred to by Judge Lindley, dissenting below, upon which petitioners rely,* do not, we submit, support the position that

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* *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 409, 432, and *United States* v. *B. & O. R. R. Co.*, 293 U. S. 454. In *Wichita Railroad & Light Co.* v. *Public Utilities Comm. of Kansas*, 260 U. S. 48, also cited by Judge Lindley, in holding that an administrative order was invalid because of the absence of findings, the Court said: "We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State." In *Mahler et al.* v. *Eby*, 264 U. S. 32, also referred to by Judge Lindley, the Court required a petitioner in a habeas corpus proceeding to be held in custody while the case was remanded to the Secretary of Labor for the purpose of adding to the warrant of deportation the findings which the Court held were essential to its validity under the terms of the statute. In that case the Court relied on the *Wichita* case, *supra*.

procedural due process requires that administrative regulatory action not operate with respect to any period of time prior to the announcement of "findings" or "determinations" by the agency with respect to any facts upon which its authority depends.* Rather, at most, these cases stand for the rule that for the purpose of informed judicial review, it must appear on the record before the reviewing court that the necessary findings or determinations have been made so that, if they are challenged, the court may be in a position to determine whether the administrative agency has acted within the scope of its authority. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197. Thus in *Twin City Milk Producers Ass'n* v. *McNutt*, 123 F. 2d 396, 398 (C. C. A. 8), the court concluded:

> * * * that the recitation as to the basis of the Administrator's action is collateral to the regulation proper; that such a formal recitation is not necessary, as a matter of statutory prescription, to give validity to the promulgating order; that it is simply a judicial requirement, imposed as a convenience in a review proceeding, to aid in satisfying legal conscience and in lightening judicial responsi-

* The Constitution clearly does not require the announcement of findings or determinations where the statute is silent on that question. Cf. *Pacific States Box & Basket Co.* v. *White, et al.*, 296 U. S. 176, 186.

> bility * * *. that where an administrative order has omitted to disclose the underlying basis of the official action, the courts may properly, in their sound discretion, and where the general public interest is involved, usually should, in order to avoid the necessity for summarily striking down the order, permit a showing to be made as to the basis of the official action, by amendatory or supplementary finding, and thereafter give consideration to the validity of the order in the light of the nunc pro tunc finding and showing.

Petitioners' constitutional objection therefore resolves itself into a contention that they have been subjected to sanctions under an "*ex post facto* law" because the Administrator announced his determination under Clause (3) of the Taft Amendment subsequent to the violations alleged in the pending enforcement actions (Pet. pp. 11–12, Question 5). But this Court has time and again held that corrective measures may be taken retroactively in order to perfect previously imperfect administrative action. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–622; *United States* v. *Morgan* 307 U. S. 183; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; *Mahler* v. *Eby*, *supra*. Cf. *H. P. Hood & Sons* v. *United States*, 307 U. S. 588; *Twin City Milk Producers Ass'n* v. *McNutt*, 122 F. 2d 564 (C. C. A. 8). If due process required the announcement of findings or the holding of hearings as conditions precedent to

the lawful operation of administrative action, the cases above cited could not have been decided as they were.

If, as in the cases cited, administrative lapses may be corrected subsequent to the institution of judicial proceedings without contravening the due process clause, *a fortiori* there is no due process deprivation in a case like the present, where appropriate administrative action was taken long before petitioners sought administrative or judicial review.

It should be noted that even if the absence of an announcement of the Administrator's determination constituted a procedural deficiency in Maximum Price Regulation No. 30 between July 16 and September 11, 1943, it was not such a deficiency as would render the regulation indefinite so that petitioners might be left in doubt as to what obligations and prohibitions were imposed on them thereby. The Regulation was entirely clear, and petitioners had been subject thereto for an extended period of time prior to the enactment of the Taft Amendment. As pointed out by the Court below (R. 53):

> * * * if they [petitioners] were in doubt during that time it was open to them by protest to question the validity of the regulation and to secure a determination of that question. This they did not do. On the contrary they proceeded to violate the regulation without taking the steps

> which were open to them to test its continued validity. Under these circumstances they can hardly assert that they were denied due process by the failure of the Administrator to make his determination before they violated the regulation.

This conclusion is unassailable.[10]

Petitioners have had full opportunity to contest the validity of Section 1347.14 (d) of Maximum Price Regulation No. 30 at all times, including the period between July 16 and September 11, 1943. By invoking the statutory machinery for securing review by way of a protest filed prior to September 11, 1943, petitioners would have had an absolute right to judicial review. That they chose not to pursue this remedy does not establish any denial of due process. *Yakus* v. *United States*, 321 U. S. 414, 444. However, in this case, petitioners had a second opportunity of which they availed themselves and as a result of which they have secured a decision on the merits.

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[10] Since neither of the enforcement actions pending against petitioners has yet gone to judgment, and the present proceeding by its nature cannot determine petitioners' guilt or innocence, the second sentence in this quotation from the court's opinion is not factually established. However, a finding of violations is not essential to the logic of the court's position. If, as a matter of fact, which will be determined in the enforcement actions, petitioners did not violate the regulation, neither the present case nor No. 67, this Term, has any present vitality. The present proceeding has practical meaning and efficacy only on the assumption of violations. Judge Maris' statement loses none of its force when made hypothetically.

Again, assuming the correctness of petitioners' present position that the announcement of a determination by the Administrator was a condition precedent to the continued validity of the Regulation, it should be noted that petitioners had to decide that it embodied standards or specifications which were not previously in general use in the industry and which had not previously been promulgated and their use lawfully required by some other Government agency before they could venture to disregard the provisions of the Regulation. Having made that decision, the petitioners were not entitled to await the Administrator's announcement, then file the protest involved in No. 67, this Term, and rely on that as a timely claim of invalidity. It certainly cannot be said to be unreasonable, or a deprivation of due process, to hold that petitioners must at least register their views as to the invalidity of the Regulation with the Administrator before proceeding to violate it in reliance on those views. The Administrator, on the other hand, had many regulations outstanding which required re-examination in the light of the terms of the Taft Amendment.[11] Thus, a judgment as to the effect

[11] Amendments were required to any regulations which re-examination disclosed to be in conflict with the Taft Amendment. Two regulations were thus revised: Revised Maximum Price Regulation No. 339—Women's Rayon Hosiery, 8 F. R. 11741, issued August 23, 1943; Revised Maximum Price Regulation No. 304—Specified Utility Shirts, 8 F. R. 12315, issued September 4, 1943. See, Seventh Quarterly

Amendment on a single regulation
d as a condition precedent to certain
action by petitioners. On the other
dministrator undertook to reexamine
dred regulations to discover whether
was in conflict with the new legisla-
person, who, like petitioners, had
ant special attention given to a spe-
tion, and possibly to request inter-
ief,[12] had a simple procedure avail-

nitted, therefore, that this case pre-
ostantial constitutional issue warrant-
y this Court of the decision below. It

Price Administrator to Congress, dated Feb-
, covering the calendar quarter ended Septem-
t pp. 18–21. As a matter of administrative
forcement action has been instituted or prose-
Administrator for violations of such regula-
between July 16, 1943, and the date they
so as to obviate any conflict between them
Amendment. This practice was adopted
not clear that it was required under the ex-
tion provisions of the Act as it read prior to
on Extension Act of 1944. At the very least,
ar that there was an absolute obligation to
he statute in the absence of the filing of a
request for the suspension of the regulation
sition of the protest. Cf. *Yakus* v. *United*
at pp. 438–439.

for intermediate relief by petitioners would
have been granted because petitioners am-
ld not have established a *prima facie* case of
n the Tait Amendment and Maximum Price
o. 30. Petitioners in this proceeding thus
k to avoid liability for violations of a regula-
heir own silence and failure to seek relief.

is submitted further that the pendency of case No. 67, arising out of the decision of the Emergency Court of Appeals that petitioners' protest of June 15, 1944, was not properly filed under Section 203 (a) of the Act, does not add any force to petitioners' assertion that a constitutional issue is presented by the instant case. Petitioners have, in this case, enjoyed whatever rights they may be entitled to under the Constitution and the statute, and, as demonstrated in the motion to dismiss case No. 67, filed by the Solicitor General on November 6, 1945, that case is moot. It cannot add vitality to the case at bar.

3. The decision of the court below can have practical importance only in relation to enforcement actions, under Section 205 of the Act, based on alleged violations, between July 16 and September 11, 1943, of the limited number of regulations outstanding on July 16, 1943,[13] which fall within the scope of Section 2 (j) (3) of the Act. Because of the statutory one year limitation on the institution of enforcement actions under Section 205 of the Act, a decision by this Court could be of practical significance only in pending enforcement actions instituted prior to September

[13] The preambles to 56 maximum price regulations were amended on September 11, 1943, by the addition to each of a statement of the Administrator's determination that there was no practicable alternative for effective price control to the standardization embodied in the regulation. Supplementary Orders Nos. 55 through 71, 8 F. R. 12550–12556.

11, 1944, more than a year ago. Only by an examination of the files in all pending enforcement actions instituted in state as well as federal courts all over the United States by consumers, under Section 205 (e), or by the Administrator, an examination conducted either through the National Office or through the numerous District and Regional Offices of the Office of Price Administration, could we be in a position to state unequivocally whether there was any possibility that a decision by this Court in this case would be decisive in any other cases. Such examination is a practical impossibility. However, it can definitely be stated that to date no protest other than petitioners' has ever been filed against a maximum price regulation raising the objection here involved, and that leave to file a direct complaint under Section 204 (e) (1) of the Act raising this objection to any maximum price regulation, has never been granted to any person other than petitioners. Therefore, it appears highly improbable that the decision in this case will affect many other cases, if any.

It is submitted that for this reason alone this Court should decline to review the decision of the Emergency Court of Appeals.

CONCLUSION

The decision below is correct, and there is no warrant for further review. The petition should be denied.

Since petitioners have repeatedly requested that this case be consolidated with No. 67, we believe it appropriate at this time to direct the Court's attention to the motion, heretofore filed by the Solicitor General in No. 67, to dismiss the writ of certiorari.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

NOVEMBER 1945.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, Pub. No. 383, 78th Cong., 2d Sess. are as follows:

Sec. 2 (j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.[1]

Sec. 203 (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof*

[1] Entire subsection (j) added by sec. 5 (a), Public Law 151, 78th Cong., 1st Sess. (July 16, 1943), 57 Stat. 566.

specified in section 206,[2] any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,[4] the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in con-

[2] As amended by sec. 106 of the Stabilization Extension Act of 1944. The section formerly read, in place of italicized language: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206."

[3] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

[4] As amended by sec. 106 of Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

nection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

Sec. 204 (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the

protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final

disposition of the case by the Supreme Court.

* * * * *

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code*, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated *or conspired to violate*. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator

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Italicized words added by sec. 6, Pub. No. 108, 79th Cong., 1st Sess. (1945).

or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code*,[5] involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provisions;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 *of this Act or section 37 of the Criminal Code*, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judg-

[5] See footnote 5, page 26.

ment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code;*[5] nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.[6]

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[5] See footnote 5, page 26.

[6] Entire subsection (e) added by sec. 107 (b) of Stabilization Extension Act of 1944.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 578

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 43–50) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on October 5, 1945 (R. 51). The petition for a writ of certiorari was filed in this Court on November 3, 1945. Certiorari was granted on January 2, 1946 (R. 53). The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency

Price Control Act, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App. Supp. IV, 924 (d), (herein sometimes termed "the Act"), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTION PRESENTED

Whether, under Section 2 (j) (3), added on July 16, 1943, to the Emergency Price Control Act of 1942, as amended, an announcement by the Price Administrator that there is no practicable alternative to a standardization for effective price control is a condition precedent to the continued validity, after July 16, 1943, of a previously valid maximum price regulation containing such standardization.

STATUTE AND REGULATION INVOLVED

The applicable provision of the Emergency Price Control Act of 1942, as amended, appear *infra*, pp. 3–4. Pertinent procedural provisions are printed in the appendix to the Price Administrator's brief in *Thomas Paper Stock Co., et al* v. *Bowles*, No. 67, this Term. Maximum Price Regulation No. 30 appears in the Federal Register (7 F. R. 9732). Supplementary Order No. 64; Statements of the Reasons Involved in the Issuance of Supplementary Orders Nos. 55 and 64; Supplementary Statement of Considerations Involved in the issuance of Maximum Price Regulation No. 30; Amendment No. 6 to Maximum Price Regulation No. 30; and Stateiment of Considera-

tions Involved In the Issuance of Amendment No. 6 to Maximum Price Regulation No. 30 appear in the Appendix, *infra*, pp. 25–47.

STATEMENT

On November 21, 1942, the Price Administrator issued Maximum Price Regulation No. 30, establishing specific maximum prices for various grades of wastepaper (7 F. R. 9732). So far as here relevant, the Regulation provided that unsorted wastepaper might not be sold to consumers thereof at a price higher than the maximum price prescribed for No. 1 mixed paper.[1]

On July 16, 1943, the Emergency Price Control Act of 1942 was amended by the addition of Section 2 (j), the so-called Taft Amendment, which provides that

> Nothing in this Act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing max-

[1] Maxmum Price Regulation No. 30 was a revision of Revised Price Schedule No. 30. On December 28, 1943, the section involved was amended by Amendment No. 6, 8 F. R. 17483. While the amendment made no change relevant to the instant case, the statement of considerations which accompanied it (see Appendix, *infra*, pp. 44–47) has bearing upon the issue here.

> imum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

For the purpose of this proceeding it is conceded that Maximum Price Regulation No. 30 "standardizes" unsorted wastepaper and, therefore, falls within the purview of Section 2 (j) (3) of the Act.

On September 11, 1943, the Administrator amended the preamble to Maximum Price Regulation No. 30 by adding the following sentence thereto:

> Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

This amendment was made by Supplementary Order No. 64,[2] which was accompanied by a state-

[2] 8 F. R. 12554, reprinted in the Appendix, *infra*, pp 28–30.

ment of the reasons involved in the issuance thereof. At the same time the Administrator issued a supplementary statement of the considerations involved in the issuance of Maximum Price Regulation No. 30.[3]

On December 17, 1943, an indictment under Section 205 (b) of the Act was returned in the United States District Court for the Northern District of Illinois, alleging that at specified times between July 16 and September 11, 1943, petitioners had made sales of unsorted wastepaper at more than the maximum price prescribed by Maximum Price Regulation No. 30 (R. 5). On June 29, 1944, a civil action under paragraphs (a) and (e) of Section 205 was brought against petitioners by the Administrator in the same court, alleging similar violations (R. 5).

On June 15, 1944, petitioners filed a protest against Section 1347.14 (d) of the Regulation, purportedly pursuant to Section 203 (a) of the Emergency Price Control Act of 1942, as amended. It was contended in the protest that Maximum Price Regulation No. 30 was currently invalid. Petitioners further specifically urged that Section 1347.14 (d) of Maximum Price Regulation No. 30 should be declared to have been invalid between July 16, 1943, and September 11, 1943. (R. 8–9.)

On June 30, 1944, the Stabilization Extension Act of 1944 (Pub. No. 383, 78th Cong., 2d Sess.),

[3] This supplementary statement of considerations appears in the Appendix, *infra*, pp. 25–28.

amending the Emergency Price Control Act, became effective. This Act added to Section 204 of the Emergency Price Control Act a new subsection (e) (Appendix to Br. in No. 67) which provides (1) for a limited right of defendants in proceedings under Section 205 to secure review of maximum price or rent regulations through direct complaint to the Emergency Court of Appeals without prior resort to the administrative protest procedure of Section 203; and (2) for the stay, or dismissal of, or vacation of judgment in, actions brought under Section 205 under certain circumstances.

On July 29, 1944, the Acting Administrator issued an order, accompanied by an opinion, denying petitioners' protest (R. 7).[4] Thereupon, on August 26, 1944, petitioners filed a complaint with the Emergency Court of Appeals, pursuant to Section 204 (a) of the Emergency Price Control Act of 1942, as amended, seeking review of the denial of the protest (R. 7). On March 27, 1945, the Emergency Court dismissed the complaint, holding that the contested provision of Maximum Price Regulation No. 30 was currently valid and that the court had no jurisdiction under Section 204 (a) of the Act to consider the objection that the provision was invalid during the period July 16 to September 11, 1943, by virtue of the Administrator's failure to publish his determination

[4] See pp. 15–29 of the record in No. 67, this Term.

that there was no practicable alternative for securing effective price control (R. 7–8, 148 F. 2d 831). Petitioners sought review of this decision of the Emergency Court of Appeals and certiorari was granted by this Court on June 4, 1945. No. 67, this Term.

On May 10, 1945, the District Court of the United States for the Northern District of Illinois, Eastern Division, in case No. 43 CR 735, granted the petitioners leave to file with the Emergency Court of Appeals a direct complaint under Section 204 (e) (1) to challenge the validity of Section 1347.14 (d) of Maximum Price Regulation No. 30 for the period between July 16 and September 11, 1943 (R. 11–12). A complaint under Section 204 (e) of the Act was filed by petitioners on June 8, 1945 (R. 1–5). The Emergency Court of Appeals dismissed the complaint on the merits (R. 51), holding that the enactment of the Taft Amendment on July 16, 1943, did not render Section 1347.14 (d) of Maximum Price Regulation No. 30 invalid between July 16, 1943, and September 11, 1943, when the Administrator announced his determination that there was no practicable alternative for effective price control to the standardization embodied in that section of the Regulation (R. 43–47).

SUMMARY OF ARGUMENT

The question here presented is whether the provision of Maximum Price Regulation No. 30

standardizing wastepaper must be declared to have been invalid between July 16, 1943, when section 2 (j) was added to the Emergency Price Control Act, and September 11, 1943, when the Price Administrator announced his determination that there was no practical alternative to such standardization for effective price control. Neither the statutory language nor the legislative history supports petitioners' argument that the amendment was intended to render immediately invalid all regulations containing standardization provisions, until such time as the Price Administrator might announce determinations with reference to the necessity for such provisions. The critical need, at the time of passage of the Amendment, for maintaining continuity of price control negatives such an intention on the part of the Congress.

No principles of law compel the result for which petitioners contend. In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the Court's discussion of the necessity for expressed findings was linked with its condemnation of an invalid delegation of legislative power; and the case in any event does not hold that findings must be announced when a regulation is issued. This Court has approved the practice of remanding proceedings to an administrative agency to supply needed findings which, when supplied, will serve to validate the administrative order from the outset. No case has been cited in which an administrative order

has been invalidated where the necessary findings had been made before judicial review. The Price Administrator announced his determination with respect to the waste paper standard here involved long before judicial review was sought. Since under the Act administrative hearings intended to build a record for judicial review are held after the issuance of regulations, there is especial reason why findings announced after a regulation has become effective should be recognized as satisfying the statutory requirement; for the prescribed procedure is not intended to secure participation by individual affected parties in the administrative determination, but merely to assure adequate evidence that a considered administrative judgment has been reached.

The correctness of the Price Administrator's finding is not properly in issue here. Petitioners did not challenge it in their complaint, although the Price Administrator's determination had been announced long before. In any event there is no substance to petitioners' suggestion that the Price Administrator's determination does not refer to the period prior to September 11, 1943, the date of its publication. The statement made by the Administrator shows plainly that his determination was based upon conditions which had existed for some time.

The construction placed upon the statute by the court below does not present any substantial constitutional questions. The previous discus-

ows that the requirements of due process tisfied if, prior to or during the course of l review, procedural deficiencies are cor- . And there is no problem here of *ex post* legislation. The regulation involved was nding for some time prior to, and at the f, the alleged violations. The Price Ad- rator's determination defined no new of- and did not affect the content of that which ners are charged with having committed.

ARGUMENT

rtinent provision of Maximum Price Regulation) remained effective between the time of the enact- of Section 2 (j) (3) of the Emergency Price Con- ct and the Administrator's determination, made ant to the amendment

language of Section 2 (j) (3) of the Emer- Price Control Act, as amended, and ap- e principles of law support the conclusion court below that a provision of a regulation rdizing a commodity, which was valid and ct on the date on which that section was o the Act, was not rendered ineffective be- that date and the date the Administra- nounced his determination that there was ticable alternative to such standardization ctive price control. In this proceeding the n is whether Section 1347.14 (d) of Maxi- Price Regulation No. 30 must be declared been invalid between July 16, 1943, when 2 (j) was added to the Act, and Septem-

ber 11, 1943, when the Price Administrator publicly announced his determination that there was no practicable alternative to the standardization embodied in the regulation for effective price control.

Although the validity of the standardizing provision prior to July 16, 1943 and subsequent to September 11, 1943 is not questioned, petitioners contend that it must be declared to have been invalid between those dates because under the Taft Amendment the announcement of the Price Administrator's determination was a condition precedent to the continued effectiveness of any standardization provision of a regulation outstanding at the time of the enactment of the amendment. The statutory language upon which they rely is:

> Nothing in this Act shall be construed * * * as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization that no practicable alternative exists for securing effective price control with respect to such commodity; * * *

Certainly the foregoing language did not by its terms repeal outstanding regulations which standardize commodities (*United States* v. *Pepper Bros.*, 142 F. 2d 340 (C. C. A. 3)), nor does it purport to render any outstanding regulations immediately unenforceable or ineffective. Indeed, it is

hard to conceive that the Congress could have intended any such result. The basic pattern of the Act to which the Taft Amendment was added is to provide the continuity of control without which relentless inflationary pressures generated by a wartime economy could not be held in check. *Yakus* v. *United States*, 321 U. S. 414, 432–433. The Taft Amendment became law at a time when the struggle against inflation was in a critical phase. Cf. Executive Order No. 9328, *Stabilization of Wages, Prices, and Salaries*, April 8, 1943, 8 F. R. 4681. It is not lightly to be concluded that, in this context, the Congress intended to require virtual suspension of an indefinite number of maximum price regulations until the Price Administrator could review them.

That the Congress did not have any such intention is affirmatively indicated by the statement of Senator Taft at the time he offered the Amendment in the form in which it was finally enacted. He said:

> Mr. President, as the Senate will remember, in one of the appropriation bills we included a very tight provision against grade labeling and the elimination of trade names. The amendment was inserted on the floor of the House. The language used was not very apt for the purpose.
>
> Price Administrator Brown came before the committee and urged that it would seriously hamper his price regulations in

> a number of trades, regulations for which had already been issued, to many of which there was no objection. He submitted another form of amendment, carrying out the same purpose, but making it perfectly clear that it would not interfere with those regulations, which are proper. [Cong. Rec. July 6, 1943, Vol. 89, p. 7251.]

It was later found to be the fact that there was no objection to the standardization provisions of many outstanding regulations. The Administrator's subsequent review of the regulations outstanding when the Taft Amendment was passed disclosed that although more than 50 of them "standardized" commodities, all but two were in conformity with the substantive requirement of the Amendment.[5]

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[5] The preambles to 56 maximum price regulations were amended on September 11, 1943, by the addition to each of a statement of the Administrator's determination that there was no practicable alternative for effective price control to the standardization embodied in the regulation. Supplementary Orders Nos. 55 through 71, 8 F. R. 12550–12556. Amendments were required to any regulations which re-examination disclosed to be in conflict with the Taft Amendment. Two regulations were thus revised: Revised Maximum Price Regulation No. 339—Women's Rayon Hosiery, 8 F. R. 11741, issued August 23, 1943; Revised Maximum Price Regulation No. 304—Specified Utility Shirts, 8 F. R. 12315, issued September 4, 1943. See, *Seventh Quarterly Report of the Price Administrator to Congress*, dated February 15, 1944, covering the calendar quarter ended September 30, 1943, at pp. 18–21. Recently, the Administrator announced, in connection with Maximum Price Regulation No. 203, Vita-

Since the language of the Taft Amendment does not in terms require the invalidation of regulations between the effective date of the Amendment and the date of the announcement by the Price Administrator of the prescribed determination, and since the circumstances under which the Amendment was passed negative an intention on the part of Congress to produce such a result, petitioners' contention can be sustained only if as a matter of law the language used by the Congress permits of no other result. Such a result, however, is neither necessary nor proper under the applicable principles of law relating to administrative findings.

Petitioners appear to place their major reliance on certain language of this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. However, the Court's discussion of the requirement for expressed jurisdictional findings in that case was closely linked to its condemnation of the invalid delegation of legislative power contained in the

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min A Natural Oils and Concentrates, that although he believed the standards or specifications there employed were in general use in the trade prior to price control and were authorized by clause (4) of the Taft Amendment, he had determined that in any event there is no practicable alternative for securing effective price control. (Amendment No. 5 to Maximum Price Regulation No. 203, 10 F. R. 9798. A statement of considerations involved in the issuance of this amendment was filed with the Division of the Federal Register on August 6, 1945. OPA Serv., Chemicals and Rubber Desk Book, pp. 11, 139–11, 140.)

statute, which emphasized the importance of findings. "If it could be said," the Court stated,

> that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual. * * *
>
> * * * To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown. [293 U. S. at 431–432.]

There is no indication that the jurisdictional finding must have been announced at the time the regulation was issued. What the Court has said is that before a court may impose punishment for violation of an administrative regulation it must appear to the court that the regulation is within the scope of the administrative authority.

In the *Panama Refining Co.* case jurisdictional findings had never been made; the record before the Court was devoid of them. It does not appear from the opinion that if the statute had contained sufficiently definite standards the Court would not have recognized findings made after the regulation was promulgated.

This Court has frequently approved the practice, upon judicial review of administrative orders, of remanding the proceedings to supply needed findings. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177. Cf. also *Addison* v. *Holly Hill Fruit Producers, Inc.,* 322 U. S. 607; *Eastern Central Ass'n* v. *United States,* 321 U. S. 194; *United States* v. *Morgan,* 307 U. S. 183; *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364; *Mahler* v. *Eby,* 264 U. S. 32. In the *Ford* case the opinion states:

> There is nothing * * * in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by * * * making additional findings where these are necessary * * * [305 U. S. at 375].

In *United States* v. *B. & O. R. R. Co.,* 293 U. S. 454, also referred to by petitioners, as in the *Panama* case, the requisite findings had been omitted altogether by the Interstate Commerce Commission. Petitioners refer to no case, and

we are aware of none, in which a court has invalidated an administrative order where the necessary findings had been articulated before the proceeding came before the court for review. Certainly the purpose which is served by findings, of facilitating judicial review of the orders to which they relate, is met in the present situation. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board, supra; Twin City Milk Producers Ass'n* v. *McNutt*, 123 F. 2d 396, 398 (C. C. A. 8th).

In the case at bar, the Administrator had publicly announced his determination long before judicial review was sought. The record clearly shows the determination upon which the Administrator's authority depends and hence conforms to the language of this Court in the *Panama* case, *supra*. If the present case had arisen under a statute which required an administrative hearing before issuance of the regulation, there could be no doubt that on the record which exists here the regulation would not be stricken nor would the proceedings be remanded because of the absence of an administrative determination. Under the Emergency Price Control Act, which provides for administrative hearings after issuance of a regulation, pursuant to a protest, a finding such as has now been made to support the regulation is sufficient; for, as pointed out by the Emergency Court of Appeals, the purpose of the statutory protest proceeding to build a record for judicial review has been met. Cf. *Bowles* v. *Willingham*,

321 U. S. 503, 515–516. Nor does a case like the present, originating in a direct complaint under section 204 (e) (1) of the Act, present a different situation; for that section contemplates administrative proceedings, by authorization of the court, in advance of a final judicial determination whenever necessary for the development of an adequate record. In the present case, no such administrative assistance was necessary since the Administrator's determination had long since been published and was a matter of public record when the proceeding was instituted.

As already indicated, this Court has permitted requisite findings, as well as other procedural omissions, to be supplied even after judicial review has been instituted. When such procedural corrections have been made, they have operated in many cases, or would operate when made, to support or define rights and liabilities arising before the procedural infirmities were removed. See especially *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; *United States* v. *Morgan, supra; Addison* v. *Holly Hill, supra.* Petitioners have sought to distinguish the *Morgan* case from the case at bar on the ground that it involved property *in custodia legis.* But in *Addison* v. *Holly Hill* this Court expressly stated that the existence of a *res in custodia legis* was immaterial to the decision in the *Morgan* case, 322 U. S. at 621. Nor can petitioners claim a right to participate in any administra-

tive proceedings leading to the Price Administrator's determination, for clearly the statute does not secure such participation but is intended rather to assure adequate evidence of proper administrative consideration of the necessity for the standardization which is embodied in the regulation. We submit, therefore, that no principle of law relating to the necessity for the expression of administrative findings warrants the invalidation of the regulation here assailed.

No substantial issue is presented with respect to the correctness of the Price Administrator's finding. In their complaint petitioners did not contend that the regulation conflicted in substance with section 2 (j) (3) of the Act in that there was any practicable alternative for effective price control to the standardization provision contained in the regulation, between July 16 and September 11, 1943.[6] Any attack on the Regulation as invalid because not in conformity with the substantive requirement of the Taft Amendment comes too late in the petition for a writ of certiorari. As indicated by the opinion of the court below, petitioners' failure to raise any substantive objection to the validity of the regulatory provision during the period in question must be taken as a concession that the Regulation conformed to the statu-

[6] No such contention was made in the protest filed by petitioners out of which case No. 67 this Term, arose. No. 67, R. 1-9.

tory standards, since the burden is upon a complaint to establish the invalidity and to set forth initially all specific objections to a regulation. Sections 203 (a), 204 (a) and 204 (e) of the Act. Since in the present case the Administrator's determination had been published long before petitioners instituted any action for the purpose of securing judicial review, they have had ample opportunity to dispute the factual basis of the determination, which also was publicly announced,[7] but they have not seen fit to do so.

It should be pointed out, however, that even if it were properly raised and relevant to the issues before the Court, petitioners' contention that the Administrator's determination does not speak as of the period between July 16 and September 11, 1943, is patently insubstantial. It is implicit throughout the supplementary statement of considerations issued simultaneously with the amendment of the preamble to the Regulation, making formal announcement of the Administrator's determination, that the determination was based upon conditions which had existed in the industry for some time. There was no indication whatsoever that the determination was based on facts which had occurred subsequent to the passage of the Taft Amendment. Any possibility that the

[7] The complete text of the supplementary statement of considerations appears in the Appendix, *infra*, pp. 25–28. It was filed with the Division of the Federal Register under the Federal Reports Act.

determination, although justified on September 11, 1943, when it was announced, was not supported by the facts prior to that date is negatived by the recitation in the supplementary statement of considerations, issued only 57 days after the passage of the Taft Amendment, that:

> Both consumers and dealers are in agreement that it is necessary to provide this penalty price upon sales of unsorted paper to consumers.

We submit, therefore, that the court below was correct in ruling that Section 1347.14 (d) of Maximum Price Regulation No. 30, concededly valid prior to July 16, 1943, and subsequent to September 11, 1943, was not rendered invalid between these dates because the administrative determination prescribed by section 2 (j) (3) of the Act was not publicly announced until the latter date.

Petitioners contend, however, that this interpretation of the statute has the effect of depriving them of certain constitutional guarantees. They appear to raise two constitutional issues: (1) that failure to require the announcement of the Administrator's determination as a condition precedent to the continued effectiveness of the regulation has denied them procedural due process; and (2) that the interpretation of the statute made by the court below has the effect of subjecting petitioners to prosecution under an *ex post facto* law.

The previous discussion, we believe, disposes of the due process objection. None of the cases to which reference has been made by petitioners stands for the proposition that there is a general constitutional requirement that administrative action must be supported by findings, and this Court has held to the contrary. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186. In this case, moreover, the findings required by the statute have been made and appear in the record; and, as we have shown, they have been reached in a proper manner.

Petitioners' contention that they have been subjected to prosecution under an *ex post facto* law is likewise unsound. The danger inherent in *ex post facto* legislation against which the constitutional guaranty was intended to guard, is that a person might be subjected to criminal penalties for acts which he could not know were proscribed at the time he committed them. No such situation is presented in this case. Here, Maximum Price Regulation No. 30 was outstanding at the time of the violations alleged in the enforcement proceeding out of which this case arises. The provision which petitioners are charged with having violated had been in effect for about 14 months prior to the date of the alleged violations.[8] The

[8] Section 1347.14 (d) of MPR No. 30 was identical to Section 1357.10 (a), footnote 2, of Revised Price Schedule No. 30 as amended May 12, 1942, 7 F. R. 3576.

Administrator's announcement of a determination on September 11, 1943, did not for the first time define any crimes for a previous period or alter the content of the previous regulations. In no sense can it be said that petitioners have been subjected to *ex post facto* legislation.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.
RALPH F. FUCHS,
Department of Justice.
RICHARD H. FIELD,
General Counsel,
JACOB D. HYMAN,
Associate General Counsel,
JOSEPHINE H. KLEIN,
ROSANNA A. BLAKE,
Attorneys,
Office of Price Administration.

FEBRUARY 1946.

68-2174 46 4

APPENDIX

Pertinent administrative actions by the Price Administrator are as follows:

OFFICE OF PRICE ADMINISTRATION

SUPPLEMENTARY STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF MAXIMUM PRICE REGULATION NO. 30—WASTEPAPER

In the light of the amendment (Pub. Law 151, 78th Cong.) adding to the Emergency Price Control Act of 1942 a provision (paragraph (j) of Section 2) which restricts the power of the Price Administrator to make use of standards in price control, Maximum Price Regulation No. 30 has been re-examined. Based upon this examination, the Price Administrator has determined, that the regulation complies with that amendment. As far as possible, Maximum Price Regulation No. 30 fixes maximum prices for different kinds, classes or types of wastepaper only in terms of specifications or standards which prior to the issuance of the regulation were in general use in the wastepaper industry. Insofar as it may not do so, the Price Administrator find the variances essential to price control in this field.

Maximum Price Regulation No. 30 establishes dollar and cent maximum prices for thirty-two grades of wastepaper, and provides that the maximum price for any unlisted grades shall be a price in line with the maximum price stated in the regulation for the nearest related grade. The speci-

fications of the thirty-two listed grades were arrived at after extensive conferences with producers and consumers of wastepaper. Grade-listings and specifications in all available trade journals dealing with wastepaper were also examined. As a result of these conferences and studies, grades were established and defined in accordance with industry practices.

It must be conceded that in an industry of this type, absolute certainty with respect to the prevalence of any particular standard would not be possible, particularly since industry practices in various sections of the country, and indeed with respect to individual companies, are by no means uniform. To the extent that any specifications stated in Maximum Price Regulation No. 30 deviate from the exact specifications which were in general use in the trade or industry affected, the Price Administiator finds there was no practicable alternative for securing effective price control with respect to the particular grades involved. Regardless of any unclarity in industry practices in this respect, certain specifications and standards of general applicability are essential to price control. Maximum prices cannot be established for an infinite number and variety of grades, kinds, classes or types of wastepaper. Representatives of the industry are in agreement that the specifications and standards established by this regulation represent the best possible averaging of general industry practices.

The fact that certain grades of wastepaper are not listed and must be priced under a separate pricing procedure does not effectuate any standardization. The listed grades constitute all of the

standard grades, and the industry is in complete agreement that no standard grade has been omitted from that list. It was necessary to provide a separate procedure for the pricing of unlisted grades because sales of such unlisted grades are so irregular that there would be no established market prices and differentials upon which maximum dollar and cent prices could be based.

In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not heretofore known in the industry. Section 1347.14 (b) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for "No. 1 mixed paper." This was not the practice in the industry prior to price control. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. Maximum Price Regulation No. 30 penalizes sellers upon their sales of unsorted paper to a consumer. This provision affects a very small percentage of the industry's total volume and is absolutely necessary in order to secure effective price control with respect to wastepaper. Since every lot of unsorted paper, is always of a different value from any other lot of unsorted paper, it would be impossible to establish a fair price for sales of unsorted paper. To exempt sales to consumers of unsorted paper would have the result that only those consumers who were able to sort their own paper would be able to obtain any supplies, thus giving such consumers an unfair advantage. Both consumers and dealers are in agreement that it is

necessary to provide this penalty price upon sales of unsorted paper to consumers.

In light of the foregoing, the Price Administrator finds that except for comparatively minor exceptions, Maximum Price Regulation No. 30 fixed minimum prices for different kinds, classes, or types of wastepaper only in terms of exceptions or standards, which prior to the issuance of the regulation, were in general use in the wastepaper industry, and, that with respect to any exception, no practicable alternative exists for securing effective price control over sales of wastepaper. The Price Administrator finds, also, that insofar as Maximum Price Regulation No. 30 effectuates standardization in the wastepaper industry, such standardization is the only practicable method of securing effective price control with respect to the wastepaper involved. In light of all of the foregoing, the Price Administrator finds that Maximum Price Regulation No. 30 complies with paragraph (j) of Section 2 of Emergency Price Control Act of 1942, as amended.

Issued this 11th day of September 1943.

Office of Price Administration

Part 1305—Administration

Supplementary Order 64

Amendment of preamble of certain maximum price regulations covering paper, paper products, raw materials for paper and paper products, printing and publishing with respect to use of specifications or standards

A statement of the reasons for the issuance of this supplementary order has been issued simul-

taneously herewith and filed with the Division of the Federal Register.*

It is hereby ordered, That:

§ 1305.90. *Amendment of preamble of certain maximum price regulations covering paper, paper products, raw materials for paper and paper products, printing and publishing with respect to use of specifications and standards.*—(a) The preamble to each of the price regulations listed below is amended by adding thereto the following sentence:

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected.

Regulation and Federal Register Citations:

RPS 32; 7 F. R. 1264, 2000, 2132, 2740, 3182, 8949.
MPR 129; 7 F. R. 3178, 3242, 3482, 3554, 4176, 4668, 5172, 5780, 5712, 5943, 7974, 8939, 8948, 9131, 9724, 10152, 10812.
RMPR 257; 8 F. R.
MPR 307; 8 F. R. 1389, 2335.
MPR 349, 8 F. R. 3617, 6110, 7266.
MPR 359; 8 F. R. 4635, 4727, 6736.
MPR 365; 8 F. R. 4721.
MPR 369; 8 F. R. 5174.
RMPR 387; 8 F. R. 8507.

(b) The preamble to each of the price regulations listed below is amended by adding thereto the following sentence:

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected and have

*Copies may be obtained from the Office of Price Administration.

previously been promulgated and their use lawfully required by another Government agency.

Regulation and Federal Register citations:

MPR 114; 7 F. R. 2843, 3576, 5059, 5564, 8997, 8948; 8 F. R. 321, 2334, 8877, 10558.
MPR 400; 8 F. R. 7556.

(c) The preamble to each of the price regulations listed below is amended by adding thereto the following sentence:

Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation.

Regulation and Federal Register citations:

MPR 30; 7 F. R. 9732; 8 F. R. 3845, 6109, 7350, 7199, 7821.
MPR 47; 8 F. R. 270.
RMPR 130; 7 F. R. 9251, 10255; 8 F. R. 1586, 2670, 7766.
MPR 266; 7 F. R. 9229, 10379, 11009; 8 F. R. 164, 606, 9380.
MPR 344; 8 F. R. 3198, 6109.
MPR 182; 7 F. R. 5712, 6048, 7974, 8997, 8948, 9724.

This supplementary order shall become effective September 11, 1943.

(56 Stat. 23, 765; Pub. Law 151, 78th Cong.; E. O. 9250, 7 F. R. 7871; E. O. 9328, 8 F. R. 4681)

Issued this 11th day of September 1943.

CHESTER BOWLES, *Acting Administrator.*

OFFICE OF PRICE ADMINISTRATION

STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 64

The reasons for the issuance of this supplementary order are the same as those for the issuance of Supplementary Order No. 55 and the latter are incorporated herein by reference.

Issued this 11th day of September 1943.

CHESTER BOWLES, *Acting Administrator.*

OFFICE OF PRICE ADMINISTRATION

STATEMENT OF THE REASONS INVOLVED IN THE ISSUANCE OF SUPPLEMENTARY ORDER NO. 55 AMENDMENT OF PREAMBLE OF CERTAIN MAXIMUM PRICE REGULATIONS COVERING GROCERY PRODUCTS AND TOBACCO WITH RESPECT TO USE OF SPECIFICATIONS OR STANDARDS

The Taft Amendment to the Emergency Price Control Act of 1942 restricts the power of the Administrator to make use of standards in price regulation. The Amendment, contained in House Joint Resolution No. 147 which continued the Commodity Credit Corporation, adds a new paragraph (j) to Section 2 of the Emergency Price Control Act of 1942. The standards provisions are contained in clauses (3) and (4) of this paragraph which provide as follows:

> (j) Nothing in this Act [i. e. the EPCA] shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standard-

ization that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency.

To determine whether and to what extent the price regulations issued by the Office of Price Administration conform to the "standards" requirement of the Taft Amendment, the Administrator has caused every price regulation to be carefully scrutinized. Supplementary Order No. 55, which this Statement accompanies, amends the preamble of the price regulations covering grocery products and tobacco E. H. P. by adding appropriate findings of compliance with the Amendment, wherever this may be done. Similar orders are being issued with respect to other price regulations issued by the Office of Price Administration. In addition, a separate supplementary statement of considerations is being issued for each regulation justifying the finding that the regulation complies with the Amendment. Appropriate amendments will be issued to those price regulations in which a finding cannot be made of compliance with the "standards" provisions of the Taft Amendment.

Since doubts have been expressed as to the exact meaning of the "standards" provisions, it is ap-

propriate that the Price Administrator state his views as to their meaning and intent and the basis upon which he has acted in determining whether the price regulations issued by this Office conform to the requirements of the provisions.

> Clause 3 of the Taft Amendment states that "Nothing in this act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity.

Although as was pointed out by Senator Taft, "the word 'standardization' which went into the amendment was not thought of or debated particularly" (*Cong. Rec.*, July 6, 1943, at p. 7327), it is clear from the legislative history and context of the clause that to "standardize" was considered as meaning, broadly, to establish standards or to require conformity to standards.

Thus, for the purposes of price control, the Administrator "standardizes" a commodity—that is, establishes standards for it—whenever he bases ceiling prices upon standards or specifications which were not previously established either by general industry usage or by the action of another Government agency. The clause recognizes the Administrator's authority to establish standards whenever he determines "that no practicable alternative exists for securing effective price control with respect to" a commodity

The Administrator, however, does not "standardize" a commodity merely by basing ceiling

prices for it upon standards, when the commodity had already been standardized either by the general and voluntary use of those standards in the industry or by the action of another Government agency requiring their use.

When the Price Administrator requested the relaxation of the prohibition against standardization contained in the War Agencies Appropriation Bill, which unqualifiedly prohibited the Administration from "requiring * * * standardization", he accepted this understanding of "standardize." He did this explicitly by accompanying the proposal that he retain power to standardize when essential to effective price control with a suggested clarifying provision declaring that "no order * * * shall be deemed to require standardization" because it fixes maximum prices for different kinds, classes or types of a commodity described in terms of standards or specifications which were "in substantial use in the * * * industry affected" or were established by another Government agency. For text, see *Cong. Rec.*, July 6, 1943, at p. 7326.

The Administrator's proposal was accepted without change as an amendment to the Commodity Credit Corporation Bill by the Senate Committee on Banking and Currency. Although the committee amendment was subsequently modified on the floor, nothing in the changes which took place, or in the history of the provision either in the Senate or the House, suggests any other understanding of the basic concept of standardization.

Clause 4 of the provisions states that "Nothing in this Act shall be construed

> * * * (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards under such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

This clause had its origin in the provision which the Administrator proposed to amend to the clause (now clause 3) giving him power to standardize where essential for effective price control. The purpose of this provision was to make clear that the action it described—the setting of maximum prices on the basis of standards already established—was *not* standardization. In the form proposed by the Administrator the clause was approved by the Senate Banking and Currency Committee in a report submitted by Senator Wagner (for himself and Senator Taft). *Senate Report No. 387*, 78th Cong., 1st Sess., July 3, 1943. In this report, the action described in the clause was treated as wholly distinct from standardization. *Id.*, at p. 3.

The form of the clause was changed as a result of an amendment offered from the floor by Senator Taft. He stated that the amendment had the approval of the Administrator and presented it as meeting the objections which the Administrator had raised to the proviso in the Appropriation Act which prohibited outright any order "requiring * * * standardization." The purpose of the amendment seems to have been to pre-

vent the claim that pricing by reference to types of standards, *other than those specified in the clause*, would not be "standardizing" and hence would not be subject to the limitations in clause 3. The change in form resulting in forbidding the Administrator to price by standards, when he had not established the standards in the manner permitted by clause 3, unless the standards were of the particular kinds which clause 4 specifies. Had Senator Taft intended to confine the Administrator's power to make use of standards to commodities already standardized, and thus to deny the Administrator's own power to standardize, his amendment would have been a reiteration of the proviso and could not possibly have been supposed to satisfy the objections to that proviso which the Administrator had expressed.

In explaining the amendment, Senator Taft said: "The amendment as I now offer it is only slightly different from the committee amendment." *Cong. Rec.*, July 6, 1943, at p. 7327. In addition to the change already noted, the modified amendment tightened the committee amendment in two other respects. It required that industry standards, if they were to be a basis of action under clause 4, should have been in "general" not merely "substantial," use, and that standards promulgated by another Government agency should be standards which the agency had lawfully required to be used. These three changes were not improperly described as "slight". No such description could have been made of a change which deprived the Administrator of any power to establish new standards, however essential to price control, and which, in

so doing, invalidated scores of outstanding maximum price regulations.

The statement of the managers on the part of the House pointed out that the Taft Amendment warranted "the repeal of the somewhat broader limitations recently included in the National War Agencies Appropriations Act of 1944, to which the Administrator objected." The characterization of the Taft Amendment as imposing narrower limitations than the appropriation proviso would not be true if clause 4 nullified clause 3.

Some uncertainty has been expressed as to the meaning of the Taft Amendment because of two statements which appear in the managers' statement.

1. In describing the effect of clause 4, the managers state: "But requirements that standards or specifications may be used in manufacturing or selling, or that such standards appear on the invoice, are prohibited" except where the standards meet the conditions specified in clause 4. Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 unless he can bring his action within the exception to clause 3 by making a determination that no practicable alternative to standardization exists for securing effective price control.

2. The managers also state: "Each of these four limitations [the four clauses] is made separately applicable to the issuance of maximum price regulations." The purpose of this obser-

vation seems to have been to reassure those who, like Senator Vandenberg (See *Cong. Rec.*, July 6, 1943, at p. 7327), feared that the Administrator might attempt to exercise his power to standardize so as to impair trade and brand names or to reintroduce grade labeling. The statement indicates that compliance with the exception in clause 3 will not justify action in violation of clause 1 or 2 which relate to trade and brand names and grade labeling. It does not indicate that clause 4 defeats clause 3. Clause 4, had its origin in a purpose to indicate actions which *were not subject* to clause 3, and the distinction between the actions subject to each clause was consistently maintained during the bill's history. It cannot be said that clause 4 governs actions which *are subject* to clause 3 and so limits them as in effect to nullify the power to standardize which the exception in clause 3 permits.

As a result of this analysis of the language of the Taft Amendment and its legislative history, the Administrator has reached the conclusion that he may properly issue price regulations in which prices are based on or calculated by reference to standards or specifications only if one of the following conditions is met:

1. The standards or specifications were, prior to their use in the regulation, in general use in the industry.

2. The use of the standards or specifications was, prior to their use in the regulation, lawfully required by another Government agency.

3. The Administrator has determined that no practicable alternative to using the

standards or specifications exists for securing effective price control.

This conclusion accords with the President's understanding of the meaning of the Taft Amendment, as stated by the President when he signed the Commodity Credit Corporation bill. The President stated that a construction which would prohibit "the Administration from making use of standards in any case regardless of how essential they were to price control unless such standards had been previously established by industry acceptance or trade acceptance" would "cripple price control". The President declared that he signed the bill with the understanding that the Taft Amendment "preserved power in the Administrator to 'standardize' a commodity in any case on which this was absolutely essential to an effective system of fixing prices."

Issued this 11th day of September 1943.

CHESTER BOWLES, *Acting Administrator.*

PART 1347—PAPER, PAPER PRODUCTS, RAW MATERIALS FOR PAPER AND PAPER PRODUCTS, PRINTING AND PUBLISHING

[MPR 30,[1] Amdt. 6]

WASTEPAPER

A statement of considerations involved in the issuance of this amendment, issued simultaneously herewith has been filed with the Division of the Federal Register.*.

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[1] 7 F. R. 9732; 8 F. R. 3845, 6109, 7350, 7199, 7821, 13049.

*Copies may be obtained from the Office of Price Administration.

Maximum Price Regulation No. 30 is amended in the following respects:

1. Section 1347.10 is amended to read as follows:

§ 1347.10. *Records and reports.*—(a) Every person who has been required under Revised Price Schedule No. 30 to keep records for inspection by the Office of Price Administration shall preserve such records for so long as the Emergency Price Control Act of 1942 shall remain in effect.

(b) Every person who purchases or sells commercially packed wastepaper, either for his own account, or for the account of another, shall make, and shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942 shall remain in effect, complete and accurate records of each purchase or sale of wastepaper by him, whether or not the same be commercially packed showing the following:

(1) Date of purchase or sale.

(2) Name and address of the buyer or seller.

(3) Grade of wastepaper purchased or sold.

(4) Quantity or each grade purchased or sold.

(5) Whether the wastepaper purchased or sold was commercially packed or in other condition.

(6) Prices or other charges paid or received.

(7) Warranties, if any, given or received.

Such records shall set forth separately the f. o. b. point of shipment price, the origin and destination of the shipment, the means of trans-

portation used, the amount of the transportation charge, and any other amounts paid or received in connection with such sale.

(c) Every consumer of wastepaper shall in addition to the above make and keep a complete and accurate record of each shipment of wastepaper delivered to him and of all weighing, inspecting, sorting, sampling, testing or grading operations performed by him or on his behalf with respect to each such shipment. Each record of each shipment required by this paragraph shall show:

(1) The date of its delivery to the consumer;

(2) The manner of its delivery, that is, by freight car, truck, or other means of transport;

(3) The freight car number, vehicle license number or other identification of the vehicle or other means of transportation in or by which delivery is made;

(4) The total weight of wastepaper and other material contained in the shipment, and the weight of each bale or package comprising the same;

(5) All facts relating to such shipment which have been ascertained at or after delivery thereof by performing upon such shipment or any portion thereof any weighing, inspecting, sorting, sampling or testing operations. Facts required to be recorded are:

(i) The ~~grade name of~~ each grade of wastepaper found in the shipment or sample;

(ii) The total weight of wastepaper from such shipment which was inspected, sorted, sampled, tested or graded;

(iii) The weight, ascertained by inspecting, sorting, sampling, testing or grading the wastepaper from such shipment upon which such operations or any of them were performed.

(*a*) Of each grade of wastepaper found in the shipment or sample; and

(*b*) Of outthrow; the term "outthrow" as shown in such record, and as used herein shall have the meaning given to it by this regulation.

(6) The names of the person or persons responsible for supervising the receiving, weighing, inspecting, sorting, sampling, or testing of the wastepaper delivered.

(d) On or before January 15, 1944, every person who sells commercially packed wastepaper shall file with the Office of Price Administration, Washington, D. C., an inventory statement of wastepaper on hand as of December 31, 1943. This inventory statement shall show all wastepaper owned or possessed by him or for his account, and shall be broken down to show the location of all wastepaper covered by it. In the event that any person fails to comply with this requirement, or if the inventory statement filed by him is incorrect or incomplete, in addition to any other penalties prescribed by law, such person must file on or before the 15th day of each month thereafter an inventory statement in the form above specified, which statement shall be as of the last day of the preceding month.

(e) Persons required to keep records and submit reports to the Office of Price Administration shall keep such other records and submit such other reports in addition to or in place of those

required in this section as the Office of Price Administration may from time to time require.

2. Appendix A (d) is amended to read as follows:

> (d) *Maximum prices for unsorted wastepaper.*—The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for "No. 1 mixed paper", regardless of the grades and quantity of each grade contained in such unsorted wastepaper.

3. The text of Appendix A, paragraph (f) preceding sub-paragraph (1) is amended to read as follows:

> (f) *Invoice requirements.*—All sales of waste paper commercially packed shall be invoiced. When delivery of the wastepaper is out of seller's warehouse, the invoice shall accompany the delivery or be mailed to purchaser before the end of the business day following the day upon which the wastepaper is shipped. In all other cases, the invoice shall be mailed before the end of the business day following the day upon which the wastepaper is shipped except that in those cases where seller does not receive the description of the wastepaper from his own supplier within that time, he shall send the invoice to purchaser as soon as he does receive that description. A copy of such invoice shall be kept on file by the seller, and the original shall be kept on file by the purchaser. The invoice shall state as separate items, the following data:

This amendment shall become effective January 4, 1944.

NOTE: The record-keeping and reporting requirements of this amendment have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(56 Stat. 23, 765; Pub. Law 151, 78th Cong.; E.O. 9250, 7 F.R. 7871; E.O. 9328, 8 F.R. 4681)

Issued this 28th day of December 1943.

CHESTER BOWLES, *Administrator.*

OFFICE OF PRICE ADMINISTRATION

STATEMENT OF CONSIDERATIONS INVOLVED IN THE ISSUANCE OF AMENDMENT NO. 6 TO MAXIMUM PRICE REGULATION NO. 30, WASTEPAPER

The changes in Maximum Price Regulation No. 30 accomplished by the accompanying amendment are ancillary to the wastepaper compliance program undertaken by the Office of Price Administration. This program is being conducted with the utmost vigor because of the seriousness of the wastepaper black market. The existence of this black market is universally acknowledged by wastepaper sellers and consumers alike. Unless checked, it will lead to a complete break down of the price control program for this very important raw material. If that were permitted to occur, honest consumers of wastepaper would be unable to obtain their fair share of the available supply. Normal distribution of wastepaper would be completely disrupted, which would further diminish supplies. Cost increases to consumers would mount so as to affect seriously the production and distribution of the vital products for which wastepaper is a raw material.

Wastepaper constitutes more than 50% of the furnish for all paper products, and it is assuming an even greater importance as a substitute for virgin woodpulp which is growing scarcer because of the lack of manpower for wood cutting. Wastepaper constitutes far more than one half of the furnish for all paperboard, from which the containers are made that carry countless war and essential civilian items throughout the world. The material is so short at present that pressure upon the ceilings established by Maximum Price Regulation No. 30 are very strong. Present indications are that the shortage will continue and that pressure against the ceilings will not abate. Consequently, it is clear that an effective compliance program is essential. The changes embodied in the accompanying amendment are an indispensable adjunct to a workable compliance program.

The only substantive change relates to the so-called "unsorted" wastepaper provision in the regulation. This provision, which in effect exempted sales of unsorted waste paper below the consuming level, is now amended so that sales of unsorted waste paper at any level may not be made at a price in excess of the maximum price permitted by the regulation for "No. 1 Mixed Paper." This change was necessary because dishonest dealers had utilized the provision to outbid dealers who were living up to the regulation. Since the former was permitted under the regulation to bid more for the unsorted wastepaper than he could obtain for the wastepaper after sorting unless he violated the ceilings, the honest competitor found it impossible to compete in purchasing the un-

sorted material. Prior to price control in this field, most unsorted wastepaper moved at the price for mixed paper, and the change consequently does not substantially affect normal business practices. In those few instances where the new provision might otherwise penalize the owner of wastepaper containing valuable fibre, the owner can sort the wastepaper before making the sale.

The most extensive changes in the regulation relate to the keeping of records. The new record keeping provisions do not require any substantial amount of new records to be made, but they do require records which exist to be preserved. In particular, the new provisions require the consumer to keep very complete receiving records and also to record and preserve all data relating to any sample, testing, or inspecting operations made by him. The very great majority of consumers make such records at present. The new provisions will put a stop to the practice of falsifying records which has been engaged in by certain consuming mills.

The record-keeping is also expanded to require persons who sell commercially packed waste paper to keep records upon all their purchases and sales, whether or not the waste paper thus bought or sold is commercially packed. Also new is a provision that an inventory report be made on waste paper on hand as of December 31, 1943. This requirement is necessary in order to make it possible to determine what quantity of waste paper has actually passed through the hands of the waste paper dealer during any period of time. This information in turn will make it possible to prevent

above ceiling payments being made by means of a scheme of invoicing and paying for quantities of waste paper which were in fact not shipped.

Finally, the invoice requirement is slightly expanded. All sales of commercially packed waste paper must now be invoiced, rather than only those sales which are made to a consumer. The new invoice requirement is also more definite and certain with respect to the time within which sellers of waste paper must render an invoice to their buyers.

In light of the foregoing, the Price Administrator finds that Amendment No. 6 to Maximum Price Regulation No. 30 is consistent and will effectuate the purposes of the Emergency Price Control of 1942, as amended, and Executive Orders 9250 and 9328.

Issued this 28th day of December 1943.

CHESTER BOWLES, *Administrator.*

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